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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

NO.

Charles R. Shepherd,
Petitioner,

vs.

Gail Adams Shepherd
Respondent.

PETITION FOR THE WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

ROBERT L. PENNINGTON
1400 Candler Building
Atlanta, Georgia 30043
(404) 658-8000
Counsel of Record for Petitioner

KEVIN C. GREENE
1400 Candler Building
Atlanta, Georgia 30043
(404) 658-8000
Counsel for Petitioner

QUESTION PRESENTED

Whether the Courts of Georgia were correct in allowing to stand an award of alimony which was based upon the unconstitutional "wives only" alimony statutes of that State in spite of Petitioner's timely and repeated attacks thereon?

PARTIES TO THE PROCEEDING

All of the parties to the proceeding are set forth fully in the caption of the case.

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OPINION BELOW

The decision of the Supreme Court of Georgia is reported at ___ Ga. ___, ___ S.E.2d ___ (1981) and appears as Appendix A hereto. The opinion of the Supreme Court of Georgia on rehearing is unreported and appears as Appendix B hereto.

JURISDICTIONAL STATEMENT

The judgment of the Supreme Court of Georgia was rendered and entered on February 25, 1981. A timely Petition for Rehearing was denied on March 11, 1981. This Court has jurisdiction under the provisions of 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS AND STATUTES

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STATEMENT OF THE CASE

Since 1973, Petitioner has been burdened with a judgment which was rendered pursuant to an unconstitutional statute. Although this case arises in the context of a domestic quarrel, it evinces a deprivation of constitutional rights in a most egregious manner. The courts of the State of Georgia repeatedly have refused to remedy the effect of a clearly unconstitutional statute.

The factual background of this case is as follows. On December 1, 1972, Respondent filed the instant action in the Superior Court for DeKalb County, Georgia. She sought separate maintenance in the form of temporary and permanent alimony (Appendix N). On March 7, 1973, the trial court entered an order allowing temporary alimony pending a trial upon the issues of permanent alimony, which order was affirmed by the Supreme Court of Georgia. *Shepherd v. Shepherd (I)*, 231 Ga. 257 (1973) (Appendix C).

Thereafter, and before a pre-trial order was entered, Petitioner amended his answer, pursuant to Ga. Code § 81A-115(a) (Appendix Z), challenging the constitutionality of the Georgia "wives only" permanent alimony statutes[1] (Appendices N, O, P and Q). The trial court overruled a motion to dis-

[1] At that time Georgia provided only wives with the right to alimony. Husbands were precluded from seeking such relief. See, *Ga. Code* § 30-201 et seq. (1973) (Appendix Y).

miss based upon the constitutional defense; that was affirmed by the Supreme Court of Georgia based upon that Court's then existing interpretation that the Georgia alimony statutes were constitutionally valid. *Shepherd v. Shepherd (II)*, 232 Ga. 354 (1974) (Appendix D).

On February 4, 1974, a jury entered an award of permanent alimony in the amount of $15,000.00 lump sum to be followed by a monthly payment of $500.00 per month (Appendix V). On appeal from that judgment Petitioner again raised, without success, his constitutional attack on the "wives only" permanent alimony statute. *Shepherd v. Shepherd (III)*, 233 Ga. 228 (1974), *cert. den.*, 421 U.S. 932 (1975) (Appendix E). When the remittitur was made the judgment of the trial court, the temporary alimony decree was extinguished.

In March of 1975, while *Shepherd (III), supra,* was still pending before the Supreme Court of Georgia, Petitioner commenced a separate action for divorce. *(Shepherd v. Shepherd,* Civil Action File No. 85,395, Superior Court for DeKalb County, Georgia.) On May 12, 1976, a total divorce was granted and Respondent waived any claim for alimony in the divorce proceeding. In *Shepherd v. Shepherd (VII)*,[3]

[3] *Shepherd v. Shepherd (IV)*, 234 Ga. 708 (1975) (Appendix F) was dismissed for failure to comply with Supreme Court Rule 14(a). In *Shepherd v. Shepherd (V)*, 236 Ga. 425 (1976) (Appendix G), the Court held that while the separate divorce action was pending the wife was not entitled to continue to receive alimony under the jury's award in the separate maintenance case. In *Shepherd v. Shepherd (VI)*, 239 Ga. 22 (1977) (Appendix H), the Court found error in the trial court's setting

241 Ga. 484 (1978) (Appendix I), the Supreme Court of Georgia found that since the divorce decree was silent as to permanent alimony, the award made by the jury in the prior separate maintenance suit remained binding upon the parties.

Upon return of the remittitur in *Shepherd v. Shepherd (VIII)*,[3] but prior to the entry of judgment on remittitur by the trial court, Petitioner on March 15, 1979, moved the trial court to set aside the judgment of permanent maintenance based upon the United States Supreme Court decision in *Orr v. Orr*, 440 U.S. 268 (1979), which was decided on March 5, 1979, and the decision of the Supreme Court of Georgia in *Stitt v. Stitt*, 243 Ga. 301 (1979), which was decided on March 8, 1979. Both of those decisions were after the Supreme Court of Georgia's decision in *Shepherd (VIII)*, *supra*. Those cases found the permanent maintenance alimony statutes of Georgia to be unconstitutional. The trial court reasoned that since the right to receive separate maintenance in the form of permanent alimony was based upon unconstitutional statutes, the court was without jurisdiction on the face of the record to enter the judgment which had been entered on March 4, 1974. This defective jurisdiction was sub-

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aside of an order holding Appellant in contempt.

[3] *Shepherd v. Shepherd (VIII)*, 243 Ga. 253 (1979) (Appendix J), involved an appeal from an Order of the trial court which had allowed an amendment to be made in response to the wife's motion for contempt. The amendment was made after the remittitur was issued but before it was entered. Based upon the amendment the trial court again vacated the contempt order and the decision was reversed based upon the doctrine of "law of the case."

ject to attack under *Ga. Code* § 81A-160(a) or 81A-160(d) (Appendix AA). The trial court vacated the award of separate maintenance.

In *Shepherd v. Shepherd (IX)*, 244 Ga. 545 (1979) (Appendix K), the Supreme Court of Georgia reversed the order of the trial court and ruled that, based upon the doctrine of "law of the case," the trial court had no authority to affect the judgment of the case prior to the entry of the remittitur.[4]

Following the issuance of the remittitur in *Shepherd (IX), supra,* judgment upon the remittitur was entered by the trial court. Petitioner, in consideration for the principles enunciated in *Shepherd (VIII)* and *Shepherd (IX),* waited until the judgment upon remittitur had been entered before making a motion to set aside the existing judgment of permanent maintenance. The non-amendable defect which appeared on the face of the record below was the fact that the statutory scheme upon which the judgment was based has been void *ab initio.* That being so, the trial court was without jurisdiction to enter the judgment. A challenge to the trial court's jurisdiction may be brought at any time. *Ga. Code* §§ 81A-160(a), (f) (Appendix AA).

The Motion to set aside the judgment was denied in the order of the trial court dated June 16, 1980

[4] The Court also found that since the litigation was in the "contempt phase," *Id.* at 547 n.2, it was too late to challenge the unconstitutionality of the alimony statutes upon which the underlying judgment was based; in so doing, the Court inadvertently overlooked the fact that this defense had been raised before any trial.

(Appendix L). This decision was appealed to the Supreme Court of Georgia pursuant to *Ga. Code* § 2-3104 (Appendix W). By its decisions of February 25, 1981 and March 11, 1981, the Supreme Court of Georgia let stand the decision of the trial court and perpetuated the effect of the unconstitutional "wives only" alimony statute as it was applied to Petitioner.

ARGUMENT:

A. THE AWARD OF ALIMONY CONSTITUTES AN UNCONSTITUTIONAL BURDEN UPON PETITIONER IN VIOLATION OF THE EQUAL PROTECTION CLAUSE OF THE UNITED STATES CONSTITUTION.

The award of almost $70,000 for permanent alimony was based upon statutes of Georgia which have been held to be unconstitutional.

This action was commenced by Respondent in December of 1972. She sought alimony under *Ga. Code* §§ 30-201, *et seq.* Relief was granted to Respondent on March 4, 1972 under those statutory provisions. Those same alimony provisions have been declared unconstitutional by the Supreme Court of Georgia. *Stitt v. Stitt, supra; accord, Orr v. Orr, supra.* It is beyond dispute that the judgment of March 4, 1974, is based upon an unconstitutional statutory scheme.

The only question left to determine is whether Petitioner properly has preserved his right to protect himself from the unconstitutional burden imposed by the rendition of a judgment based upon those un-

constitutional statutes. Petitioner asserts that he did. Petitioner filed a timely answer, and pursuant to Section 15(a) of the Georgia Civil Practice Act, *Ga. Code* § 81A-115(a), he filed amendments to that answer before the trial of this case or the entry of a pre-trial order. Pursuant to law, these amendments related back to the original answer and were deemed to have been filed at the time of the original answer. *Ga. Code* § 81A-115(c). Petitioner's answer raised and specifically challenged the constitutionality of the alimony statutes under which Respondent sought relief. The burden imposed by the judgment upon Petitioner constitutes an enforcement of an unconstitutional statute and an infringement upon his federal constitutional rights. To allow the judgment to stand would be sanctioning a direct violation of the Constitution of the United States. *Cf. Orr v. Orr, supra.*

B. THE JUDGMENT OF MARCH 4, 1972 HAS BEEN VOID *AB INITIO* AND RESPONDENT HAS TAKEN NO RIGHTS THEREUNDER.

It is well settled under both federal and state law that an unconstitutional statute, though having the form, features, and name of law, is in reality no law at all. It is wholly void. In legal contemplation it is as if it had never been passed. It has been declared that it is a misnomer even to call such a statute a law. Such a statute confers no authority and affords no protection. *Norton v. Shelby County,* 118 U.S. 425 (1886); *Ex Parte Shiebold,* 100 U.S. 371 (1879); *Dennison Manufacturing Company v. Wright,* 156

Ga. 789, 797 (1923); *McCants v. Layfield,* 149 Ga. 231 (1919).

In *Osborne v. Bank of The United States,* 22 U.S. 738 (1824), Chief Justice Marshall declared that "it is an extravagant proposition that a void act can afford protection to the person who executes it." In *Boston v. Cummins,* 16 Ga. 102, 106 (1854), the Supreme Court of Georgia declared that "the unconstitutional acts of the legislature, state and federal, are not laws; and no court will execute them, having a proper sense of its own obligations and responsibilities." In *Wellborn v. Estes,* 70 Ga. 390 (1883), the Supreme Court of Georgia again stated: "legislative acts in violation of the constitution of this state or of the United States are void." Even proceedings that are commenced under an unconstitutional statute before such statute is judicially declared to be unconstitutional are void. *Dennison Manufacturing Company v. Wright, supra; Jordan v. Franklin,* 131 Ga. 487 (1908); *Worth County v. Crisp County,* 139 Ga. 117 (1912); *James v. Blakely,* 143 Ga. 117 (1914).

Based upon these principles, it is clear that the judgment entered on March 4, 1974, is void and unenforceable and the court below was without jurisdiction to enter it. As such, the jurisdictional challenge brought at this time should be sustained and this judgment below vacated. *Ga. Code* § 81A-160(a).

C. PETITIONER HAS NOT WAIVED HIS CONSTITUTIONAL CHALLENGE TO THE STATUTES IN QUESTION.

In an effort to preserve some semblance of judicial order following the finding of the unconstitutionality of Georgia's alimony laws, the Supreme Court of Georgia has wisely fallen back upon the rule that a failure timely to raise a constitutional challenge amounts to a waiver of any right to challenge such law. *See, Kosikowski v. Kosikowski,* 243 Ga. 413 (1979); *Kirkpatrick v. Woodruff,* 243 Ga. 736 (1979); and *Hunsinger v. Leachman,* 244 Ga. 104 (1979). This is but a specific application of the general rule that one may not raise on appeal federal constitutional issues which have not been raised at trial. *Ellerman v. California,* 344 U.S. 357 (1953); *Barbour v. Georgia,* 249 U.S. 454 (1919); *Mutual Life Ins. Co. v. McGrew,* 188 U.S. 291 (1903); *accord, Turk v. State Highway Dept.,* 226 Ga. 245 (1970); *Jackson v. Baker,* 207 Ga. 446, 448 (1950); *See also, Orr v. Orr, supra*; C. Wright, *Federal Courts,* 541-542 (3rd ed. 1976). Failure to raise the constitutional issue *at trial* is seen as a procedural default and constitutes a waiver of the right to raise later the issue even if the statute is ultimately declared unconstitutional.

However, the instant case does not involve a belated attempt to take advantage of *Orr v. Orr, supra,* as was true in *Kosikowski v. Kosikowski, supra,* wherein the Court held that a failure to challenge the alimony statutes "at the time of trial" was a waiver. Indeed, Petitioner has repeatedly asserted his constitutional attack. Prior to trial, he amended

his answer specifically to add this defense under *Ga. Code* § 81A-115(a). This amendment related back to the time of filing the original answer. Petitioner then moved to dismiss the complaint on this basis; that motion was rejected by the Supreme Court of Georgia in *Shepherd (II), supra,* on the authority of *Murphy v. Murphy,* 232 Ga. 352 (1974). Petitioner's constitutional attack was pursued at the trial and was in part the subject of his appeal in *Shepherd (III), supra.* Each time Petitioner presented his constitutional attack, the Supreme Court of Georgia reaffirmed the validity of the Georgia alimony statutes. However, the Supreme Court of Georgia never held that his constitutional attack was not timely.

In *Shepherd (IX),* the constitutionality of these statutes was again raised. Of course, this was after *Orr v. Orr, supra,* and *Stitt v. Stitt, supra,* which vindicated Petitioner's argument that the alimony laws of Georgia were unconstitutional. However, the courts of Georgia again refused to correct the unconstitutional effect of the law as it was applied to Petitioner. While the basis of the Court's ruling appeared to be a procedural error of the trial court in failing to follow the mandate in *Shepherd (VIII), supra,* which required the remittitur to be entered before the trial court could affect the case, the Supreme Court of Georgia also indicated that, since the Court had ruled adversely to Petitioner before *Orr,* he was unable to assert this defense in a contempt proceeding, citing *Hunsinger v. Leachman, supra.*

In *Hunsinger,* there had been no constitutional attack at the trial; the defense was raised for the first

time in defense of a contempt citation. The same is true in the case of *Kirkpatrick v. Woodruff, supra,* wherein the constitutional attack was not made until after trial and in fact was not even made until at the contempt hearing.

These principles of waiver are not applicable to the case at bar. Petitioner is not raising an attack to the contempt proceedings below. The finding of contempt by the court below is only related to this appeal in that it is based on the underlying judgment which Petitioner herein attacks. Petitioner is not attacking the contempt proceeding directly. It is the portion of the order in which the trial court refused to set aside the underlying judgment from which Petitioner seeks relief.

Clearly, Petitioner's failure to obtain relief from his unconstitutional burden is not attributable to any waiver on his part. In fact, close scrutiny of the history of this case reveals that, to date, Petitioner's failure to obtain relief from his unconstitutional burden is a result of the fact that he raised his defense too early. Having raised his defense and lost under the then existing, but incorrect, interpretations of the Constitution, Petitioner is now seemingly barred from further relief based upon the "law of the case" doctrine.

D. THE "LAW OF THE CASE" DOCTRINE MAY NOT BE INVOKED TO SANCTION A VIOLATION OF PETITIONER'S CONSTITUTIONAL RIGHTS.

1. The "Law of the Case" Doctrine Does Not Apply To This Anomalous Case.

Respondent may suggest that the doctrine of "law of the case" precludes the instant challenge to the judgment below.[8]

The law of the case rule is codified at *Ga. Code* § 81A-160(h) which provides:

> "The law of the case rule is hereby abolished, but generally judgments and orders shall not be set aside or modified without just cause, and in setting aside or otherwise modifying judgments and orders, the Court shall consider whether rights have vested thereunder, and whether or not innocent parties will be injured thereby: Provided, however, that any ruling by the Supreme Court or the Court of Appeals in a case shall be binding on all subsequent proceedings in that case in the lower court and in the Supreme Court or Court of Appeals as the case may be."

It has been held that even though the above-stated rule abolishes the law of the case rule in the trial courts of Georgia, such abolition has no application to the appellate courts. Although Respondent

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[8] The Supreme Court of Georgia has suggested this in *Shepherd v. Shepherd*, 243 Ga. 253, 255 (1979) and *Shepherd v. Shepherd*, 244 Ga. 545, 547 (1979).

and the Georgia courts would apply the rule automatically and literally, Petitioner submits that in light of the unique factual, legal and constitutional characteristics of this case, the law of the case rule does not apply to the issue on appeal; or, alternately, a narrow exception must be recognized for this anomalous case. Either result would not disturb the integrity of the rule, but would comport with the applicable law and public policy, as well as this Court's ultimate authority to affect justice in this case. Any other result would cause the continuation of a clearly recognized infringement of the constitutional rights of Petitioner. Petitioner suggests that to the extent the rule of the law of the case is applied without exception to this case, the rule itself is unconstitutional in that it furthers and results in an unconstitutional burden.

The unique combination of factors which surround this case, and which dictate against the rote application of the law of the case rule, are as follows:

(1) The Petitioner challenged the constitutionality of the statute in his answer;

(2) The defense of unconstitutionality was overruled by the trial court and that decision was affirmed by the Supreme Court of Georgia, *Shepherd v. Shepherd*, 232 Ga. 354 (1974), based upon the law of *Murphy v. Murphy*, 232 Ga. 252 (1974) which reiterated the then existing interpretation of the Constitution of the United States by the Supreme Court of Georgia that the Georgia alimony statutes were constitutional;

(3) Petitioner's application for the writ of certitorari filed in the United States Supreme Court in which he sought to challenge the alimony statutes of this state was denied on April 21, 1975, *Shepherd v. Shepherd,* 421 U.S. 932 (1975), (this denial did not constitute an affirmance of the opinion of the Supreme Court of Georgia, *City of Indianapolis v. Chase Nat'l Bank,* 314 U.S. 63 (1941); 1B Moore's *Federal Practice* ¶ 0.404[5]);

(4) A decision by the United States Supreme Court striking, as a violation of the Constitution of the United States, alimony statutes such as the one under which Respondent had been awarded recovery, *Orr v. Orr, supra;*

(5) A decision by the Supreme Court of Georgia in *Stitt v. Stitt, supra,* specifically striking the alimony statutes of Georgia such that, as a matter of law, the statutory scheme under which Respondent received recovery was totally void and deemed to have never existed;

(6) A decision of the courts below which refused to set aside the judgment of this case, even though that judgment was constitutionally infirm and the constitutional defense had not been waived.

These factors present a unique situation never before confronted in the application of the doctrine of law of the case. In this case, the rule must be regarded with considerable discretion to avoid an obvious injustice.

The United States Supreme Court has consistently held that the law of the case, unlike res judicata, commands a discretionary, rather than mandatory, application. *See e.g., Southern Railway Company v. Clift,* 260 U.S. 316 (1922); *Messenger v. Anderson,* 225 U.S. 436 (1912); *See also,* 1B Moore's *Federal Practice* ¶ 0.404[10] at 405. The purpose of the rule is a practical one: issues previously decided in a case should not, for the reasons of expediency, be reopened for litigation. The fundamental reason for the rule is to provide a practical end to litigation.

It is recognized that the doctrine of the law of the case is not an absolute limit on the power of an appellate court to review an earlier decision. The rule as applied to the effect of previous decisions on a latter review of the same case merely expresses the practice of courts generally to refuse to reopen what has been decided; it does not limit their power to do so in cases where such is necessary. *Messenger v. Anderson, supra* at 225 U.S. 444.

There can be no doubt that the doctrine, in ordinary cases, is a salutary one. But it does not rigidly bind the court to continue error. 1B Moore's *Federal Practice,* ¶ 0.404[10]. Even when applying sparing exceptions to the rule, there are occasions, such as the one at bar, when re-examination is necessary. *U.S. v. Fullerd Co.,* 156 F.2d 756, 757 (9th Cir. 1946).

Most jurisdictions recognize that the end served by this rule is merely judicial economy. Those jurisdictions apply the law of the case doctrine with flexibility such that the rigid rule does not perpetuate

error or subvert reason, justice or the public policy of the rule itself. *See*, 87 ALR 2d 272-360 (1963 & Supp. 1979). The majority of state courts follow the sensible dictate of the United States Supreme Court. Intervening and conflicting decisions will cause the reversal of judgments which were correct when entered. *Vandenbark v. Owens-Illinois Glass Company*, 311 U.S. 538, 543 (1941); *Johnson v. Cadillac Motor Car Co.*, 261 F. 878 (2nd Cir. 1919).

There are some decisions of Georgia Courts which suggest the law of the case will be invoked in Georgia to prevent review of earlier decisions even when the earlier result is clearly incorrect. *See* e.g., *Redmond v. Blau*, 153 Ga. App. 395 (1980) (interpretation of instruments as securities under state blue sky law); *Srochi v. Kamensky*, 121 Ga. App. 518 (1970) (enforceability of a note); *Life and Casualty Insurance Company v. Webb*, 115 Ga. App. 521 (1967) (interpretation of a life insurance contract). However, no court has ever considered the law of the case rule to preclude vindication of a federal constitutional right.

The Courts of Georgia have an obligation to follow the mandates of the United States Supreme Court on issues involving interpretation of the Constitution of the United States. That duty is paramount to enforcement of the doctrine of the law of the case regardless of how well that rule might serve judicial economy in the ordinary situation involving construction of state law. *Cf. American Ry. Express Co. v. Davis*, 158 Ark. 493, 250 S.W. 540 (1923); *A.B. Moss & Bro. v. Ramey*, 25 Idaho 1, 136 P. 608 (1913).

In summary, the doctrine of law of the case has no application to the case at bar. The facts of this case are anomalous to the extent this case involves an intervening decision of the Supreme Court of the United States on a federal constitutional issue. Petitioner has not waived his right to vindicate his constitutional guarantees. The Courts of Georgia have an obligation to enforce the law, as pronounced by the Supreme Court of the United States, and to do substantial justice.

2. Enforcement Of The Rule Of Law Of The Case Without Exception In The Case At Bar Is Itself Unconstitutional.

Undeniably, the judgment entered March 4, 1974, imposes a burden on Petitioner which he would not have to bear if he were female. The statutory scheme upon which Respondent was awarded alimony imposed alimony upon husbands only. In so authorizing the imposition of alimony obligations on husbands but not wives, the statute provided different treatment be accorded on the basis of sex; it thus established a classification subject to scrutiny under the Equal Protection Clause of the Constitution of the United States. U.S. Const. amend XIV; *Reed v. Reed*, 404 U.S. 71, 75 (1971). The fact that the statute discriminated against men rather than women does not protect it from scrutiny. *Craig v. Boren*, 429 U.S. 190 (1976). To withstand scrutiny under the Equal Protection Clause, classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives. *Califano v. Webster*, 430

U.S. 313, 316-317 (1977). It is therefore necessary to question whether the burden imposed upon Petitioner is justifiable in light of an important state interest.

As seen by the earlier discussion, the only possible basis for continuing the clearly discriminatory judgment rendered against Petitioner is that the doctrine of law of the case applies without exception to this case. The governmental interest served by application of that doctrine is judicial economy and efficiency. Such a concern for convenience, however legitimate, has never been a compelling enough state interest to continue the effect of an unconstitutional statute. *See, Reed v. Reed, supra.*

Clearly, the most protected individual interest is the right to be free from unconstitutional burdens. This principal is so fundamental that it belies citation. There is no question in the case at bar that the judgment rendered by the trial court is based upon an unconstitutional statute. Therefore, the judgment itself imposes an unconstitutional burden. This Court cannot avoid justice and sanction the continuation of this unconstitutional burden solely on the pretext of judicial economy. Accordingly, if the doctrine of law of the case mandates that result without exception, then the doctrine itself is unconstitutional insofar as it perpetuates an unconstitutional burden.

E. THERE IS NO ADEQUATE INDEPENDENT NON-FEDERAL BASIS TO SUPPORT THE DECISION OF THE SUPREME COURT OF GEORGIA.

In Division 1 of its order dated February 25, 1981, The Supreme Court of Georgia ruled that since no application for discretionary appeal had been filed, the appeal must be dismissed. Respondent will argue that this constitutes an independent state basis in support of the decision and thereby precludes review by this Court of the federal constitutional issues. However, it is clear that the procedural basis for continuing and perpetuating this unconstitutional judgment constitutes a novel procedural rule which may not be used to thwart review of Petitioner's constitutional challenge.

It is a well-settled principle that the United States Supreme Court will decline to review state court judgments which rest upon independent and adequate state grounds notwithstanding copresence of federal issues. *See e.g., Fox Film Corp. v. Muller,* 296 U.S. 207 (1935). Where the state ground is substantive, this Court has no power to revise judgments on questions of state law, *Murdock v. City of Memphis,* 20 Wall. 590 (1875), and this Court will not render an advisory opinion on the federal issue. But where the state ground is purely procedural, this Court will not hesitate to act upon fundamental constitutional issues, unless the state's insistence on compliance with its procedural rule serves a legitimate state interest, *Henry v. Mississippi,* 379 U.S. 443, 447-448 (1965), and if the state procedural rule

is part of a consistent pattern of procedures of which Petitioner's counsel could fairly be deemed to have been appraised. *NAACP v. Alabama*, 357 U.S. 449, 457 (1964).

Significantly, this Court has held that the question of whether a state procedural default can preclude its consideration of a federal question is itself a federal question. *Henry v. Mississippi, supra*, 379 U.S. at 447; *Lowe v. Griffith*, 266 U.S. 32, 33-34 (1924); *cf. Lovell v. City of Griffin*, 303 U.S. 444 (1938). As Justice Holmes stated: "Whatever springes the State may set for those who are endeavoring to assert rights that the State confers, the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice." *Davis v. Wechsler*, 263 U.S. 22, 24 (1923); *accord Staub v. Baxley*, 355 U.S. 313, 318-319 (1958).

The decision of the Supreme Court of Georgia on procedural grounds is plainly inadequate to deny Petitioner review of his federal constitutional claim by this Court. The Supreme Court of Georgia relied upon *Ga. Code* § 6-701.1 which provides a procedure for securing discretionary review of:

> "Appeals from judgments or orders granting or refusing a divorce or temporary or permanent alimony, awarding or refusing to change child custody, or holding or declining to hold persons in contempt of such alimony or child custody judgment or orders."

Ga. Code § 6-701.1(a)(2).

This statute makes no provision for discretionary review of an appeal of an order refusing to set aside a judgment based upon the unconstitutionality of the judgment. None of the cases which have applied Section 6-701.1(a)(2) prior to this appeal involved situations similar to the one at bar. *See e.g., Godbold v. Godbold,* 245 Ga. 121 (1980) (appeal from contempt order); *Brown v. Brown,* 245 Ga. 44 (1980) (appeal from contempt order); *Martinez v. Martinez,* 245 Ga. 211 (1980) (appeal from contempt order); *Harris v. Harris,* 245 Ga. 75 (1980) (appeal from contempt order); *Horne v. Horne,* 245 Ga. 300 (1980) (appeal from refusal to modify alimony); *Marby v. Marby,* 245 Ga. 512 (1980) (appeal from refusal to grant divorce).

There should be no mistake; the appeal at bar did not seek review of any order specified in Section 6-701.1(a)(2). Petitioner emphasized that fact from the outset of his appeal to the Georgia Supreme Court where he declined to appeal from the order finding him in contempt. His enumeration of error to the Georgia Supreme Court challenged only the trial court's failure to set aside the judgment (Appendix U). Under no prior case law or the express terms of the statute would Petitioner's prior counsel who filed the Notice of Appeal have anticipated the need for discretionary review. Moreover, there is no legitimate state interest to be secured by the imposition of this rule in this case where it appears from the face of the decision issued by the Supreme Court of Georgia that no discretionary review would have been granted even if timely application had been made. In Division 2 of the opinion a majority of the

Court assessed a penalty based upon the conclusion that this appeal was taken for delay only. Obviously, the Court thought so little of Petitioner's appeal that no discretionary review would have been allowed. When a constitutional issue of the magnitude herein is presented, the Court of Georgia should not be allowed to adopt a novel interpretation of *Ga. Code* § 6-701.1(a)(2) which would result in perpetuating the constitutional error below.

CONCLUSION

For the reasons stated above, Petitioner submits that a writ of certiorari to the Supreme Court of Georgia should be issued.

Respectfully submitted,

ROBERT L. PENNINGTON
1400 Candler Building
Atlanta, Georgia 30043
(404) 658-8000
Counsel of Record for Petitioner

KEVIN C. GREENE
1400 Candler Building
Atlanta, Georgia 30043
Counsel for Petitioner

APPENDIX A

In the Supreme Court of Georgia
Decided: Feb. 25, 1981

37080. SHEPHERD v. SHEPHERD.

PER CURIAM.

1. It appearing that no application for discretionary appeal has been filed, this case must be and hereby is dismissed. Code Ann. § 6-701.1; *Godbold v. Godbold,* 245 Ga. 121 (263 SE2d 440) (1980).

2. This is the tenth appearance of this case before this court. Previous appearances are detailed in *Shepherd v. Shepherd,* 244 Ga. 545 (261 SE2d 339) (1979).

We find that this appeal was taken for delay only. The appellee's motion to tax damages for delay is granted, and the clerk is directed to enter ten per cent damages on the judgment of $63,858.84 upon the remittitur. Code Ann. § 6-1801; *Cale v. Cale,* 244 Ga. 191 (259 SE2d 448) (1979).

All the Justices concur, except Jordan, C.J., and Undercofler, J., who dissent as to division 2.

APPENDIX B

In the Supreme Court of Georgia
Atlanta, March 11, 1981

The Honorable Supreme Court met pursuant to adjournment. The following order was passed:

Charles R. Shepherd v. Gail Adams Shepherd

Upon consideration of the motion for rehearing filed in this case, it is ordered that it be hereby denied. All the Justices concur, except Jordan, C. J., Undercofler and Clarke, JJ., dissent.

SUPREME COURT OF THE STATE OF GEORGIA,

CLERK'S OFFICE, ATLANTA, March 11, 1981

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

HAZEL E. HALLFORD, Deputy Clerk.

APPENDIX C

In the Supreme Court of Georgia

28216. SHEPHERD v. SHEPHERD.

MOBLEY, Chief Justice.

Gail Adams Shepherd brought a complaint in DeKalb Superior Court against Charles R. Shepherd for temporary and permanent alimony alleging that they were married on August 5, 1972, and that her husband forced her to live separate and apart from him on October 13, 1972.

After a hearing, the trial judge granted temporary alimony to the wife, and the husband appeals from this order.

1. The first two errors enumerated are the quashing of the subpoena issued and served upon Susan Epps, the eight-year-old daughter of the wife, and the subpoena issued and served upon Mrs. Epps, the mother of the former husband of the wife. A showing was made as to the child that she was in school, her custody was not in dispute in the proceedings, and she had no information concerning the matters at issue. As to Mrs. Epps, a showing was made that a close member of her family had died in Warner Robins and she desired to go there and remain until after the funeral, her deposition had recently been taken, and is available to the husband, and she knows nothing further about the cause than the testimony given on her deposition.

The trial judge did not abuse his discretion in quashing the subpoenas.

2. The third enumerated error is the overruling of the motion to continue by the husband, because of the absence of several witnesses. The judge proceeded with the hearing as to the witnesses present, leaving the case open for further hearing. All of the other witnesses were present at the later hearing except Otis Dixon, and it appeared that he could not be located.

The trial judge did not abuse his discretion in refusing the motion for continuance.

3. The fourth enumerated error contends that the court erred in overruling the husband's motion to stay. This motion asserted that the husband had filed an annulment action against his wife, on the same date that the alimony suit was filed, alleging that the marriage between the parties was void or voidable, and that the issue as to the validity of the marriage should be determined before any hearing was held on the issue of alimony.

The wife has need of support during the pendency of the annulment case, and it was not error to refuse to postpone the application for temporary alimony until the annulment case was concluded. Compare *Jones v. Jones,* 178 Ga. 710 (3) (174 SE 338); *Howell v. Howell,* 194 Ga. 743 (22 SE2d 506).

4. The fifth enumerated error contends that the court erred in finding as a matter of fact that there was a valid marriage between the parties.

The fact of the marriage of the parties is a matter to be determined in the hearing on temporary alimony. Code § 30-202. The determination of this issue in a temporary alimony hearing is not binding on a jury in a subsequent annulment trial.

The husband contended that the wife had cohabited with her former husband in a common law marriage relationship after obtaining a divorce from her former husband, and that this common law marriage had not been dissolved at the time he entered into a ceremonial marriage with her.

There was no direct evidence at the alimony hearing that the wife had entered into a common law marriage with her former husband after their divorce. The appellant husband testified that his wife had made statements to him about living with her former husband after their divorce. He introduced evidence that after her divorce from her former husband she had charged items to her former husband's accounts, he had helped her borrow money, and they had retained a joint bank account. There was other similar circumstantial evidence which might indicate that she and her former husband lived together after their divorce.

The trial judge did not abuse his discretion in finding that the evidence did not conclusively show that the appellee's marriage to the appellant was void because of an undissolved common law marriage of the wife.

5. The sixth enumerated error asserts that the court erred in awarding $5,000 to the wife as reim-

bursement for legal expenses and fees paid by her in a different case brought in a different jurisdiction, which case terminated prior to the filing of complaint for temporary and permanent alimony.

Code § 30-202 authorizes the trial judge, whenever an action for divorce or a suit for permanent alimony is pending, to grant temporary alimony, including the expenses of litigation. The expenses of litigation referred to are those incurred in the divorce or alimony action. If attorney fees were properly recoverable in such litigation in Fulton County, the wife should have obtained such fees in that case.

The trial judge erred in requiring the husband in the present alimony action to reimburse the wife for $5,000 paid to attorneys in previous litigation between the parties in another court.

6. The remaining enumerated errors assert that the judge abused his discretion in granting temporary alimony of $200 per week, $750 as reimbursement for moving expenses of the wife, $750 as alimony from the date of the separation until the date of the hearing, and $5,000 as attorney fees to the date of the hearing in the alimony case. The husband argues that this award was grossly excessive in view of his income and financial ability.

The husband testified that: He earns a salary from two corporations in excess of $60,000 per year. His home is owned by the corporations and he pays approximately $275 per month as rent. After the deduction of rent "and things of that type," his net salary is from $1,250 to $1,500 per month. He is fur-

nished an automobile by the corporations, for which the expenses are paid. He owns one automobile in his own name. He owns no real estate, stocks, or bonds, and does not have any savings account. He owes the corporations an indebtedness, which was originally $72,000, and on which some amount has been paid. There is a judgment against him and a corporation in the amount of $1,196,000. He has some claims with which he hopes to offset this judgment.

"The court has a discretion as to the sum allowed for counsel fees, even where there is no evidence as to the value of services rendered." *Ogletree v. Ogletree,* 169 Ga. 366 (150 SE 167); *Hobbs v. Hobbs,* 158 Ga. 571(2) (123 SE 891); *Proctor v. Proctor,* 224 Ga. 450 (2) (162 SE2d 398).

The trial judge is empowered to allow temporary alimony from the date of the separation to the date of the hearing. *Killingsworth v. Killingsworth,* 148 Ga. 590 (2) (97 SE 539); *Hobbs v. Hobbs,* 158 Ga. 571 (4), supra.

It appears from the evidence that the husband and wife enjoyed a very comfortable living standard while they were married, and that he still maintains such a standard for himself. His explanation of how his net monthly income is only $1,250 to $1,500, with a salary of over $60,000 per year, is vague and indefinite. It does not appear that his indebtedness must be paid immediately.

Unless there is a flagrant abuse of discretion by the trial judge, an award of temporary alimony will

not be reversed. *Hewlett v. Hewlett*, 220 Ga. 656 (2) (140 SE2d 898). There was not such an abuse of discretion in the present case in the grant of temporary alimony, including attorney fees for representing the wife in the alimony case.

Judgment affirmed in part; reversed in part. All the Justices concur.

ARGUED SEPTEMBER 14, 1973—DECIDED OCTOBER 5, 1973—REHEARING DENIED OCTOBER 25, 1973.

Temporary alimony. DeKalb Superior Court. Before Judge Norvell.

John C. Tyler, for appellant.

William H. Whaley, Glenville Haldi, for appellee.

APPENDIX D

In the Supreme Court of Georgia

28767. SHEPHERD v. SHEPHERD.

JORDAN, Justice.

On December 1, 1973, Gail Shepherd, appellee here, filed a complaint in the Superior Court of DeKalb County seeking temporary and permanent alimony from her husband Charles R. Shepherd, alleging that they were married on August 5, 1972, and that her husband had forced a separation on October 13, 1972. After a hearing on the petition the trial judge granted temporary alimony to the wife. The husband appealed to this court and we affirmed the lower court's decision. See *Shepherd v. Shepherd*, 231 Ga. 257 (200 SE2d 893).

After the decision by the court on the first appeal the appellant amended his answer and filed a motion to dismiss, claiming that the Georgia alimony statutes were unconstitutional in that they "provided that alimony and attorney fees shall be awarded to wives only, which, consequently, discriminates against husbands as a class of which appellant is a member . . ." The motion to dismiss was denied on December 26, 1973. The trial judge certified the decisions for appeal on January 7, 1974, and notice of appeal was timely filed. *Held:*

Pretermitting the question of whether the appellant raised the constitutional issue at his earliest opportunity, this appeal is controlled on its merits by

Murphy v. Murphy, 232 Ga. 352, again holding the alimony statutes of this state to be valid as against a constitutional attack.

Judgment affirmed. All the Justices concur.

ARGUED APRIL 9, 1974—DECIDED MAY 21, 1974.

Alimony. DeKalb Superior Court. Before Judge Henley.

John C. Tyler, for appellant.

Kaler, Karesh & Frankel, Glenville Haldi, William H. Whaley, for appellee.

APPENDIX E

In the Supreme Court of Georgia

29225, 29376. SHEPHERD v. SHEPHERD; and vice versa.

INGRAM, Justice.

These cases represent the third appearance in this court of some aspect of this alimony and separate maintenance action in the Superior Court of DeKalb County.

In Case No. 29225, the husband complains of the jury verdict and final judgment granting alimony to the wife on the grounds that there was no valid marriage between the parties; that there was a substantial error in the trial court's charge; that the Georgia alimony statutes are unconstitutional; and that a new trial should have been granted because of newly discovered evidence.

In Case No. 29376, the wife appeals an interlocutory order of the trial court abating an earlier award of temporary alimony on the ground that the trial court had no jurisdiction to enter the abatement order since the appeal Case No. 29225 had been docketed in this court prior to entry of the abatement order in the trial court.

We deal first with the issues raised in the husband's appeal in Case No. 29225. The wife alleged in her complaint that she and the husband were married on the 5th day of August, 1972. The husband denied this paragraph of the wife's complaint as al-

leged, but admitted in his answer "that the parties . . . entered into a purported marriage on the date alleged." On the trial of the case, the husband proceeded with his defense that no valid marriage existed between the parties because the wife had previously entered into a common-law marriage relationship with her former husband, Frank W. Epps, subsequent to the granting of a final divorce to them.

The evidence offered by the husband to show a common-law marriage between the wife and her former spouse, when construed most favorably to the husband, was substantially as follows: that there was use of a joint checking account in the Fulton National Bank of Atlanta by the wife and Frank W. Epps subsequent to their divorce decree; that Frank W. Epps arranged bank loans for the wife; that the joint banking account's monthly statements sent out by Fulton National Bank showed a change of address to the home domicile of the wife at 4680 High Point Road, N.E., Atlanta, Georgia, in a period of a few months after the divorce from Epps; that the wife continued to use the gasoline credit cards of Frank W. Epps, as well as his Master Charge credit and other charge accounts in his name such as Sears and that Frank W. Epps helped secure other loans and automobiles for the wife subsequent to their former decree of divorce. There was also testimony from two babysitters and from Helen Epps, the former sister-in-law of the wife, that Frank W. Epps and the wife had lived together after their divorce.

The wife and Frank W. Epps both denied under oath that they had ever lived together as husband and wife after their divorce or that they had ever intended to consummate a common-law marriage. The jury resolved the conflict in the evidence by its verdict granting permanent alimony to the wife. The jury necessarily concluded by its verdict that no common-law marriage existed between the wife and her former husband, Frank W. Epps, and that the ceremonial marriage between the present parties is a valid and subsisting marriage.

The jury's verdict is authorized under the evidence considered during the trial of the case. To constitute a valid marriage in this state there must be: (a) parties able to contract; (b) an actual contract; and (c) consummation according to law. Code § 53-101. The evidence did not require the jury to find that all of these necessary elements had been proven with respect to the contended common-law marriage. Cf. *Roberts v. Roberts,* 231 Ga. 196, 198 (200 SE2d 731). Therefore, a new trial is not required by the jury's verdict which necessarily determined the present marriage to be valid.

Appellant-husband also contends that a new trial should be ordered because subsequent to the final judgment in this case, appellant discovered new and material evidence which establishes that the wife and her former husband, Frank W. Epps, publicly represented themselves to be husband and wife after their divorce. This evidence consists of a document, signed under oath by the present wife and Epps approximately seven months after their divorce, that was used as a renewal application to sell spiritous

liquors at retail filed with the City of Atlanta and maintained on record in the Atlanta Police Department. We find this contention to be without merit for two reasons: (1) this document is primarily cumulative or impeaching in its character and it would not likely produce a different verdict by the jury; and (2) the affidavit of the husband concerning the discovery of this evidence shows it could have been discovered by ordinary diligence prior to the trial of the case through available discovery procedures. Thus, the requirements of Code § 70-204, authorizing a new trial on the basis of newly discovered evidence, have not been satisfied and the trial court did not err in refusing a new trial on this ground.

The husband's next contention is that the trial court committed substantial error by giving the following instructions to the jury on the trial of the case: "I charge you that if at this point in the case you find that the plaintiff and the defendant are legally man and wife, that you would then consider the question of what we call permanent alimony. I charge you that a husband, under Georgia Law, may not abandon his obligations of support for his wife and family. In cases where the law authorizes the wife to live separate and apart from her husband by reason of his ill conduct, it generally requires him to maintain her while so living. I charge you that while the law uses the term 'permanent alimony' and I have used this term in my charge to you, an award of permanent alimony can later be superseded by a judgment of divorce between the parties, and I charge you that an award of permanent alimony made to the wife in this case would not preclude ei-

ther party from subsequently entering a separate complaint for divorce. I charge you that any award of permanent alimony to the wife in this case would cease by operation of law upon her death or remarriage or subsequent divorce from her husband if not terminated earlier."

Appellant's argument as to the charge is that where alimony has been granted to the wife and subsequently a total divorce is granted to the husband by a divorce decree which is silent as to alimony, the divorce decree does not have the effect of rendering the earlier alimony judgment functus officio. See Code § 30-213, and *Cox v. Cox*, 197 Ga. 260 (3) (29 SE2d 83). We agree with this interpretation of Code § 30-213 by appellant but fail to see how appellant has been harmed by the trial court's instructions in this case. The trial court told the jury, inter alia, that if it awarded the wife permanent alimony the award can later be superseded by a judgment of divorce between the parties. This instruction by the trial court was correct and can be considered incorrect only if there is subsequent divorce litigation between the parties and the divorce decree is silent as to alimony.

Whether there will be future divorce litigation between the parties and whether it will or will not include an alimony determination remains to be seen. The trial court's instructions, when considered as a whole, were not harmful error under the facts of this case. If appellant had desired any additional or clarifying instructions on this subject, they should have been requested at the trial. Certainly, we cannot say that the instruction given, and enumerated as error,

was substantial error that was harmful as a matter of law to appellant so as to excuse an objection to the instruction at the trial. Code Ann. § 70-207.

Appellant husband's final enumeration of error asserts that Georgia's alimony laws are unconstitutional. This issue was raised and decided adversely to appellant in an earlier appeal in this case. See 232 Ga. 354. We adhere to the ruling on this issue and re-affirm the constitutionality of the alimony statutes of Georgia.

In Case No. 29376, the wife enumerates as error the trial court's interlocutory order abating the prior award of temporary alimony on the ground that, at the time the order was entered, the trial court had no jurisdiction in the case.

It is true that the order complained of was entered August 14, 1974, and that the appeal to this court in Case No. 29225 was docketed here on August 5, 1974. However, it is only the award of permanent alimony which is before this court for review in Case No. 29225. The appeal in that case superseded the verdict and judgment of permanent alimony by the trial court pending a decision in this court. See *Park v. Minton,* 229 Ga. 765, 769 (194 SE2d 465). The permanent alimony award is being affirmed by this court and will become final upon the filing of the remittitur in Case No. 29225 in the trial court. See *Hagan v. Robert & Co. Assoc.,* 222 Ga. 469 (150 SE2d 663). Until the permanent award of alimony becomes final, the parties are bound by the interlocutory order of the trial court. The interlocutory (or temporary) award of alimony, pending final adjudi-

cation of the permanent award, remains in the breast of the trial court and may be revised in the discretion of the trial court at any time prior to final determination of the case. See, *Chlupacek v. Chlupacek*, 226 Ga. 520 (3) (175 SE2d 834), and *Bickford v. Bickford*, 228 Ga. 353, 356 (185 SE2d 756). Therefore we hold that the trial court had jurisdiction to revise its temporary order while the final judgment was on appeal to this court. See also *Swindle v. Swindle*, 221 Ga. 760 (5) (147 SE2d 307).

We believe the trial court correctly decided the issues raised in each of of these cases and that its judgment should be affirmed in both cases.

Judgments affirmed. All the Justices concur.

SUBMITTED OCTOBER 16, 1974—DECIDED NOVEMBER 18, 1974.

Alimony. DeKalb Superior Court. Before Judges Hubert and Henley.

John C. Tyler, for appellant.

Glenville Haldi, Peek, Arnold, Whaley & Cate, William H. Whaley, for appellee.

APPENDIX F

In the Supreme Court of Georgia

30009. SHEPHERD v. SHEPHERD.

UNDERCOFLER, Presiding Justice.

This appeal must be dismissed for failure to comply with Rule 14(a) which deals with the timely filing of the enumeration of errors. This appeal was filed in this court on April 18, 1975. On May 8, 1975, twenty days had elapsed without the appellant filing his enumeration of errors. Pursuant to Rule 14 (a) counsel was ordered to file the enumeration of errors by May 19, 1975. The enumeration of errors has not been filed.

The appeal must be dismissed for failure to comply with the order of this court issued pursuant to Rule 14 (a). *Taylor v. Columbia County Planning Comm.*, 232 Ga. 155 (205 SE2d 287).

Appeal dismissed. All the Justices concur.

SUBMITTED JUNE 4, 1975—DECIDED JULY 1, 1975.

Contempt. DeKalb Superior Court. Before Judge Norvell.

John C. Tyler, for appellant.

Glenville A. Haldi, William H. Whaley, for appellee.

APPENDIX G

In the Supreme Court of Georgia

30831. SHEPHERD v. SHEPHERD.

INGRAM, Justice.

The parties to this appeal have returned after three prior appearances in this court growing out of their alimony and separate maintenance litigation in DeKalb Superior Court—231 Ga. 257 (1973); 232 Ga. 354 (1974); and 233 Ga. 228 (1974). A new dimension to the marital dispute was added when the husband filed a separate suit for divorce after the alimony judgment was affirmed in the last appeal to this court.

The wife then sought alimony in the divorce case and the trial court conducted a hearing on the question of temporary alimony in the divorce case on April 24, 1975. An order was entered, after hearing evidence and argument of counsel, denying any temporary alimony to the wife. Subsequently, the wife filed proceedings to have the husband held in contept of court for wilfully failing to pay money which was owed to her under the trial court's order in the earlier alimony case.

The trial court conducted a hearing in the alimony contempt case and held the husband in contempt for not paying the alimony payments which had accrued prior to the entry of the temporary alimony order in the divorce case. However, the trial court refused to hold the husband in contempt for

sums due under the prior alimony award subsequent to its denial of temporary alimony to the wife in the divorce case. The wife contends this was error because the order denying her temporary alimony in the divorce case did not cut off her right to continue receiving alimony payments under the trial court's earlier order in the alimony case.

The only issue we decide in this appeal is whether the trial court erred in ruling in the alimony contempt case that the order denying alimony to the wife in the divorce case suspended the earlier alimony award to the wife.

Under Code Ann. § 30-213, the trial court's alimony order in the divorce case is "a substitute for the [earlier alimony award] . . ., as long as said petition [for divorce] shall be pending and not finally disposed of on the merits." The present record before this court indicates there has been no final trial of the divorce case, and it remains to be seen whether a final decree in the divorce case will or will not adjudicate the wife's claim to permanent alimony after the divorce.

Consequently, at this point in the divorce litigation it cannot be determined whether the prior alimony judgment will become functus officio and without further legal efficacy. For the time being, the prior alimony award is merely "in abeyance" pending final trial of the divorce case because the trial court has entered a temporary alimony order (denying temporary alimony) in the divorce case. See Code Ann. § 30-213. Should the trial court in

the divorce action adjudicate the issue of permanent alimony, the prior award will be entirely superseded.

Tobin v. Tobin, 93 Ga. App. 568, 569(5) (92 SE2d 304) (1956), relying upon several decisions of this court, states the rule thusly: "By the terms of Code § 30-213, provision is made for the grant of alimony where the husband and wife shall be living separate, or shall be bona fide in a state of separation, and there shall be no action for divorce pending. Under the terms of this section, the alimony so granted shall be suspended 'when a petition for divorce shall be filed bona fide by either party, and the judge presiding shall have made his order on the motion for alimony.' Where, however, such alimony as provided for in this section has been granted the wife and subsequently a total divorce granted the husband but the divorce decree is silent as to alimony, the divorce decree does not have the effect of rendering the alimony decree functus officio. *Cox v. Cox*, 197 Ga. 260 (29 SE2d 83); *Higgs v. Higgs*, 144 Ga. 20 (85 SE 1041); *Evans v. Evans*, 190 Ga. 364 (9 SE2d 254); *Evans v. Evans*, 191 Ga. 752, 755 (14 SE2d 95); *Moody v. Mooody*, 193 Ga. 699 (5) (19 SE2d 504)."

An application of the above principles to the facts of the present case requires that we affirm the contempt order of the trial court from which appeal was taken. See also *Shepherd v. Shepherd*, 233 Ga. 228, 231 (210 SE2d 731) (1975).

Judgment affirmed. All the Justices concur.

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SUBMITTED FEBRUARY 16, 1976—DECIDED MARCH, 2, 1976).

Contempt. DeKalb Superior Court. Before Judge Tillman.

Glenville Haldi, for appellant.

John T. Tyler, James R. Venable, Margaret Hopkins, for appellee.

APPENDIX H

In Supreme Court of Georgia

32014. SHEPHERD v. SHEPHERD.

BOWLES, Justice.

This appeal is from an order of the DeKalb Superior Court vacating an earlier judgment of that court which held the husband-appellee in contempt for failure to pay alimony. In vacating the order, the trial judge found that the husband had never been personally served with the wife's motion for contempt, and, therefore, the court was without jurisdiction of the person in the contempt hearing.

This is the fifth appearance of this case in this court. See *Shepherd v. Shepherd*, 231 Ga. 257 (200 SE2d 893) (1973); s.c., 232 Ga. 354 (206 SE2d 460) (1974); s. c., 233 Ga. 228 (210 SE2d 731) (1974); and s. c., 236 Ga. 425 (223 SE2d 818) (1976).

The case began as a suit for alimony and separate maintenance. A judgment granting alimony was affirmed and the husband filed a suit for divorce. Before the divorce action came to trial, the wife filed a motion for contempt and this court affirmed a finding by the trial court that the husband was in contempt for not paying alimony payments which had accrued prior to the entry of the temporary alimony order in the divorce case, but held in abeyance any decision as to whether the husband was in contempt for sums due under the prior alimony award

subsequent to the trial court's denial of temporary alimony to the wife in the divorce case.

The parties were granted a divorce and while a copy of the decree is not in the record, it is indicated the judgment of divorce specifically stated that no alimony issues had been raised. *The wife, thereafter, filed a motion for contempt* in DeKalb County Superior Court asking that the husband be held in contempt for his refusal to pay sums due her under temporary alimony orders of the court and under permanent alimony awards in the final judgment of the court granting alimony dated March 4, 1974. The first attorney had withdrawn from the case by written request and counsel for the wife had been advised that the husband was now represented by a second attorney, who was known to wife's counsel although his name apparently had not been entered in the court records prior to that time. Service of the motion for contempt, together with the rule nisi thereon, was then made upon the second attorney by mail. No personal service was made upon the husband. Immediately following service on the second attorney, he filed a written answer in the case in behalf of the husband and the husband personally signed an affidavit that the allegations contained in that pleading were true and correct. A copy of that answer was served on counsel for the wife. The matter was not heard as originally scheduled and the attorney for the wife and the second attorney as then counsel of record for the husband, agreed on two or more continuances until the matter was finally set down for hearing on the 13th day of August, 1976.

No appearance was made for the husband at the August 13th hearing, but an affidavit was filed by the husband contesting the jurisdiction of the court and denying that a verified answer had been filed by him.

The trial court heard evidence presented by the wife and concluded that the husband knew of the hearing. It ruled that the permanent decree of alimony, as made in the case, was no longer stayed, but was in full force and effect; that the husband was in arrears in the total amount of $59,958.50; and granted judgment for that amount plus $8,000 attorney fees, and that the husband was in contempt. Judgment was stayed until October 1, 1976, pending the defendant's purge of his contempt.

On a motion for rehearing, the trial court set aside the judgment of contempt against the husband based on the case of *Moore v. Moore,* 229 Ga. 135 (189 SE2d 431) (1972), saying the court had no personal jurisdiction of the husband.

The wife now appeals the sustaining of the husband's motion for rehearing, finding error in the court's holding that the husband was required to be personally served with the motion for contempt and in the court's holding that it was without jurisdiction over the person of the defendant.

"A general appearance by a defendant in an action in a court having jurisdiction of the subject matter amounts to a waiver of the issuance of, or defects in the process served, and confers jurisdiction of his person regardless of the fact that process was

not served on him or that the service may have been defective. A defendant who appears and pleads to the merits without previous objection to the process, and without also objecting to the jurisdiction of the court over his person, waives any objection which he may have had to the issuance of the process, or the service, and even any objection based on the ground of total want of service." 2 EGL, Appearances, p. 161.

Code § 81A-112 (h) (CPA) provides: "Waiver or preservation of certain defenses. (1) A defense of lack of jurisdiction over the person, improper venue, insufficiency of process, or insufficiency of service of process is waived (A) if omitted from a motion in the circumstances described in subsection (g) or (b) if it is neither made by motion under this section nor included in a responsive pleading as originally filed."

See *Daniel v. Yow,* 226 Ga. 544 (3b) (176 SE2d 67) (1970); *Matthews v. Fayette County,* 233 Ga. 220 (210 SE2d 758) (1974).

"When attorneys appear in court claiming the right to represent a person named as a party to a cause, there is a strong presumption that they have the authority so to do." *Heath v. Miller,* 117 Ga. 854 (3) (44 SE 13) (1903).

"When a person of full age and laboring under no disability is named as plaintiff in a suit filed by a duly licensed attorney at law, the presumption is that the attorney had authority to file the suit in behalf of such person." *Bigham v. Kistler,* 114 Ga. 453

(3) (40 SE 850) (1901). See also *Cannon v. Whiddon*, 194 Ga. 417 (1) (21 SE2d 850) (1942).

In addition to the presumption in this case, the husband also personally signed an affidavit which was attached to the pleading filed in his behalf. If he did not know about the hearing date, had not been served and did not authorize the second attorney to plead for him, it is strange indeed that on the very day of the postponed hearing he had a third attorney to appear and present an affidavit which he had prepared denying that the husband had been lawfully served. According to the record, he has not personally appeared either in the original hearing or in the motion for rehearing, nor has he moved in any way to strike the attorney's name from the record nor to strike the responsive pleading filed in his behalf. Without a positive showing by clear evidence that the second attorney was not authorized to act in his behalf, and without an adequate explanation as to why his personal affidavit was attached to the pleadings, the assumption of the authority of the second attorney to act must be accepted. Having filed a defensive pleading without objecting to the jurisdiction of the court over his person, these were waived and he took his chances by not appearing at the appointed time and place set for the hearing.

We conclude that the trial court erred in its order in the case dated September 1, 1976, and republished as of the 6th day of October, 1976, and in not allowing its order dated September 23, 1976, which reduced to writing its verbal order from the bench in open court made on August 13, 1976, to stand.

Judgment reversed. All the Justices concur.

ARGUED FEBRUARY 17, 1977—DECIDED MAY 13, 1977.

Contempt, etc. DeKalb Superior Court. Before Judge Norvell.

Glenville Haldi, Peek, Arnold, Whaley & Cates, William H. Whaley, Jr., for appellant.

B. J. Smith, M. J. Keane, for appellee.

APPENDIX I

In The Supreme Court of Georgia

33530. SHEPHERD v. SHEPHERD.

UNDERCOFLER, Presiding Justice.

This is the sixth reported appeal in this divorce case. *Shepherd v. Shepherd,* 239 Ga. 22 (235 SE2d 538) (1977); 236 Ga. 425 (223 SE2d 818) (1976); 234 Ga. 708 (217 SE2d 286) (1975); 233 Ga. 228 (210 SE2d 731) (1974); 232 Ga. 354 (206 SE2d 460) (1974); 231 Ga. 257 (200 SE2d 893) (1973). The issue presented here is whether a statement in the divorce decree that "defendant [wife] be awarded no alimony, she having waived hearing as to alimony in the second amendment," amounts to "silence as to alimony" so that a prior alimony award in a separate maintenance action remains in force. *Shepherd v. Shepherd,* 236 Ga. 425, supra; *Tobin v. Tobin,* 93 Ga. App. 568 (92 SE2d 304) (1956). The wife's second amendment clearly stated she was not seeking alimony in the divorce case. Therefore, the issue was not relitigated and the alimony award in the separate maintenance action remains in effect. The trial court erred in setting aside the prior orders and fi. fa.'s holding the husband in contempt for failure to make these payments. *Woodall v. Woodall,* 147 Ga. 676 (95 SE 233) (1917).

Judgment reversed. All the Justices concur.

SUBMITTED APRIL 28, 1978 — DECIDED MAY 17, 1978 — REHEARING DENIED JUNE 29, 1978.

Contempt, etc. DeKalb Superior Court. Before Judge Hendon.

Peek & Whaley, Glenville Haldi, William H. Whaley, for appellant.

B.J. Smith, R. Bradley Egerton, for appellee.

APPENDIX J

In The Supreme Court of Georgia

34422. SHEPHERD v. SHEPHERD.

BOWLES, Justice.

This is the seventh reported appeal in this divorce case. All prior decisions are set forth in the most recent holding of this court in *Shepherd v. Shepherd*, 241 Ga. 484 (246 SE2d 183) (1978). We there considered the amended pleadings of the wife, as well as the pleadings of the husband in determining whether a provision in a divorce decree that "defendant (wife) be awarded no alimony, she having waived hearing as to alimony in the second amendment," amounts to "silence as to alimony" so that a prior alimony award in a separate maintenance action remains in force. We there held that the wife's second amendment clearly stated that she was not seeking alimony in the divorce case and, therefore, the issue was not relitigated and the alimony award in the separate maintenance action, which had been theretofore finalized, remained in effect.[1] In doing so, we reversed the trial court, which had set aside certain fi. fas. and prior orders holding the husband in contempt for his failure to make payments under the separate maintenance judgment.

Upon the return of the remittitur from this court to the trial court in that case, the trial court permit-

[1] The effect of this holding in light of the pleadings was that a husband cannot invoke the court's power to readjudicate the wife's prior separate maintenance award.

ted husband's counsel to amend his motion. Reconsidering the motion on its merits, the court concluded that the substance of the amendment had not been considered by this court on appeal. Thereupon, the trial court reinstated its previous order, granting the husband's motion and, in effect, overruled the solemn judgment of this court.

We again reverse.

Where the trial court, after hearing a motion to set aside a prior order in a pending case vacates the judgment complained of, and on appeal the trial court's decision is reversed without direction, judgment of the appellate court is final. Upon the remittitur from the appellate court being filed in the trial court, the issue is res judicata, and the lower court has no authority to allow the movant to amend his motion. Nor can it hear further evidence or consider any other matter that would otherwise affect the finality of the judgment of this court. The only action which that court had authority or power to take was to make the judgment of this court the judgment of the trial court and to enter an order overruling the motion to vacate. Code Ann. §§ 81A-160(h), 6-1804. *Gay v. Crockett,* 219 Ga. 248 (132 SE2d 673) (1963). Compare, *Summer-Minter v. Giordano,* 231 Ga. 601 (203 SE2d 173) (1974); and, *Ansley v. Atlanta Suburbia Estates,* 231 Ga. 640 (203 SE2d 861) (1974).

Direction is given that upon receipt of the remittitur by the trial court, a judgment be entered thereon overruling appellee's motion and reinstating the previous orders and fi. fas. set aside.

Judgment reversed, with direction. All the Justices concur.

SUBMITTED JANUARY 12, 1979 — DECIDED FEBRUARY 15, 1979 — REHEARING DENIED MARCH 6, 1979.

Alimony. DeKalb Superior Court. Before Judge Hendon.

Glenville Haldi, William H. Whaley, for appellant.

Smith, Egerton & Longabaugh, B. J. Smith, R. Bradley Egerton, for appellee.

APPENDIX K

In The Supreme Court of Georgia.

35174. IN RE HALDI.
35175. SHEPHERD v. SHEPHERD.

HILL, Justice.

This is the ninth appeal in the continuing litigation between these parties. See *Shepherd v. Shepherd*, 243 Ga. 253 (253 SE2d 696) (1979) and cits.

1. On the first appeal we held that the wife was entitled to temporary alimony pending her separate maintenance suit. *Shepherd v. Shepherd*, 231 Ga. 257 (6) (200 SE2d 893) (1973).

After that appeal, the husband amended his answer so as to raise the question of the constitutionality of our "wives only alimony" law. Without deciding whether that question was timely raised, and citing *Murphy v. Murphy*, 232 Ga. 352 (206 SE2d 458) (1974), cert. den. 421 U.S. 929, we upheld the wife's right to alimony. *Shepherd v. Shepherd*, 232 Ga. 354 (206 SE2d 460) (1974).

On the third appeal, we affirmed the jury verdict and the judgment granting with wife permanent alimony in her separate maintenance suit. Again we overruled husband's claim based on our "wives only alimony" law. *Shepherd v. Shepherd*, 233 Ga. 228 (210 SE2d 731) (1974). The U.S. Supreme Court denied certiorari on April 21, 1975. Shepherd v. Shepherd, 421 U.S. 932 (1975).

We dismissed the fourth appeal due to the husband's failure to comply with this court's order to file his enumerations of error in that contempt case. *Shepherd v. Shepherd,* 234 Ga. 708 (217 SE2d 286) (1975).

After the husband sued for divorce and the wife was denied temporary alimony in the divorce action, we held on the fifth appeal that while the divorce action was pending the wife was not entitled to continue to receive alimony on the jury's award in the separate maintenance case. There we ruled that if the issue of alimony were adjudicated in the divorce case, the prior award would be entirely superseded. *Shepherd v. Shepherd,* 236 Ga. 425 (223 SE2d 818) (1976).

As shown by the opinion in the sixth appeal, the alimony issue was not adjudicated in the divorce case and hence after the divorce was granted, the prior separate maintenance award resumed full force and effect. *Shepherd v. Shepherd,* 239 Ga. 22, 23 (235 SE2d 538) (1977).[1] We so held on the seventh appeal, where we also held that the trial court erred

[1] The fourth appeal had involved contempt for nonpayment of temporary alimony in the wife's separate maintenance case. The fifth appeal arose from the husband's action for divorce. The sixth appeal arose after the divorce and involved contempt for nonpayment of temporary and permanent alimony awarded in the wife's separate maintenance suit. As the husband contended in the sixth appeal, a proceeding to enforce a permanent alimony judgment by citation for contempt is a separate and distinct proceeding from that in which the alimony was awarded. *Harris v. Harris,* 205 Ga. 105(2) (52 SE2d 598) (1949); 9 EGL 137, 138, Divorce and Alimony, § 32 (1977 Rev.).

in setting aside its order holding the former husband in contempt for failure to pay the separate maintenance award. *Shepherd v. Shepherd,* 241 Ga. 484 (246 SE2d 183) (1978).

Upon the return of this court's remittitur after the seventh appeal, the trial court permitted the former husband to amend his motion and again set aside its order holding the husband in contempt. On the eighth appeal, we held that after this court decided the case, the trial court had no authority to allow the husband's motion to be amended, nor to hear further evidence, nor reinstate its order which this court had reversed, nor do anything except to make the judgment of this court the judgment of the trial court. *Shepherd v. Shepherd,* 243 Ga. 253, supra.

Following the eighth appeal, the trial court permitted the former husband to again amend his motion. On May 15, 1979, the trial court set aside the separate maintenance award and granted a new trial as to the verdict and judgment which this court had affirmed in 1974 on the third appeal.[2] *This the trial court cannot do.* We held that last time. *The trial court erred in allowing the husband to amend and in granting a new trial.* We repeat once more what

[2] The basis of the amendment to the motion and order was that "wives only alimony" was unconstitutional as held in Orr v. Orr, _ U.S. _ (99 SC 1102, 59 LE2d 306) (1979). We ruled on this issue on the second and third appeals, supra, and certiorari as to the third appeal was denied by the U.S. Supreme Court. We are now in the contempt phase of the litigation, which is separate and distinct from the alimony case. See fn. 1, above. It is too late in a contempt proceeding for a husband to challenge the constitutionality of our "wives only alimony" laws. *Hunsinger v. Leachman,* 244 Ga. 104 (1979).

we previously said: "Direction is given that upon receipt of the remittitur by thc trial court, a judgment be entered thereon overruling appellee's motion [to vacate and for new trial] and reinstating the previous orders and fi. fas. set aside." *Shepherd v. Shepherd,* supra, 243 Ga. at 255.

2. This court's opinion on the eighth appeal was rendered on February 15, 1979, and the former husband's motion for rehearing was denied by this court on March 6, 1979. On March 15, the husband filed his additional motions in the trial court (based upon Orr v. Orr, supra, which had been decided on March 5, 1979). This court's remittitur was filed in the DeKalb Superior Court clerk's office on March 21. The wife's counsel moved that the remittitur of this court be made the judgment of the trial court but the trial judge found that the intervening motions of the former husband filed March 15 would have to be considered before the trial court would adopt this court's judgment.

On April 12 the wife, through her counsel, moved that the trial judge recuse himself. After setting forth the pertinent dates and the fact that the judge had refused to make the judgment of this court the judgment of the trial court, the motion alleged that "Judge E.T. Hendon, by his refusal to carry out the dictates and directives of the Supreme Court and by his other actions in this case has shown that he is not impartial and should recuse himself and the Plaintiff prays . . . [for further relief]." The husband's motions and the wife's motion to recuse came

on for hearing on May 11, 1979, at which time the wife's attorney testified in support of the motion.

At the conclusion of the hearing on the motion to recuse, the trial judge, without prior notice, held the wife's attorney, Glenville Haldi, in contempt of court based on the language of the motion to recuse, its failure to disclose all the facts, the attorney's failure to present evidence to substantiate the motion, and the attorney's testimony that he felt the judge was not impartial and had predetermined the issues in the case. The attorney was sentenced to serve 20 days in jail. The attorney appeals.

We have examined the motion to recuse in this case and the transcript of the hearing on that motion and find that the evidence does not support adjudication that the attorney was in contempt.

Judgments reversed. All the Justices concur.

ARGUED JULY 11, 1979 — DECIDED OCTOBER 16, 1979 — REHEARING DENIED OCTOBER 30, 1979.

Contempt; alimony award vacated etc. DeKalb Superior Court. Before Judge Hendon.

Glenville Haldi, *pro se.*

Peek & Whaley, William H. Whaley, for appellant (Case No. 35174).

Glennville Haldi, William H. Whaley, for appellant (Case No. 35175).

B. J. Smith, for appellee.

APPENDIX L

IN THE SUPERIOR COURT OF DEKALB COUNTY
STATE OF GEORGIA

Gail Adams Shepherd,	)	
	)	
Plaintiff,	)	
	)	Civil Action
v.	)	
	)	File No. 69,633
Charles R. Shepherd,	)	
	)	
Defendant.	)	

ORDER

All of the pending and unresolved matters in the above styled case regularly came on for hearing before me, and after considering argument of counsel together with the stipulation and evidence previously submitted to me on the issue of attorney's fees, the Court makes the following rulings:

1.

The Defendant's Motion to Set Aside Judgment is hereby overruled.

2.

The Plaintiff's Motion for Additional Attorneys Fees is granted and the Plaintiff and her attorneys are awarded the additional sum of Eleven Thousand Five Hundred Dollars ($11,500.00).

3.

The Plaintiff's Motion to Update the Judgment is granted in this following manner. On October 24, 1977, this Court entered an Order finding that a total amount of $44,282.46 was due as of that date. Since that date, the Court was advised at the hearing above described that no amount has been paid on this arrearage. Therefore, the Order of October 24, 1977, is updated to show the following amounts due:

Balance due as of October 24, 1977	$44,282.46
Interest at 7% for October 24, 1977 through June 1, 1980	8,076.38
Additional attorneys fees	11,500.00
Total due as of June 1, 1980	$63,858.84

Additionally, interest shall run from June 1, 1980 at the rate of $14.14 per day.

The Court finds that as of June 1, 1980, the Defendant is indebted to the Plaintiff and to her attorneys in the sum of $63,858.84 and judgment is rendered against the Defendant in this amount. This amount shall be increased by the sum of $14.14 per day for every day after June 1, 1980, that it remains unsatisfied.

4.

The Plaintiff's Motion to Enforce the Contempt Judgment contained in this Court's Order of October 24, 1977, is hereby set for further hearing on the 16th day of June, 1980, at 9:30 a.m., before me, and

the Defendant is hereby given notice to show cause why this Court should not issue an arrest order on that date to enforce the Order and Judgment entered on October 24, 1977.

SO ORDERED this the 16 day of June, 1980.

R. KEEGAN FEDERAL, JR.,
JUDGE
Store Mountain Judicial Circuit

APPENDIX M

IN THE SUPERIOR COURT OF DEKALB COUNTY
STATE OF GEORGIA

Gail Adams Shepherd	)	
	)	
Plaintiff	)	Civil Action
	)	
vs.	)	File No. 69,633
	)	
Charles R. Shepherd	)	
	)	**Complaint**
Defendant	)	

The complaint of GAIL ADAMS SHEPHERD respectfully shows to this Honorable Court the following:

1.

The Defendant named herein is Charles R. Shepherd, on whom service may be completed at his home address of 1310 Ragley Hall Road, DeKalb County, Georgia.

2.

The Plaintiff has been a resident of DeKalb County and the State of Georgia for more than six months prior to the filing of this action.

3.

Both the Defendant and the Plaintiff are subject to the jurisdiction of this Honorable Court.

4.

The Petitioner shows that she and the Defendant were married on the 5th day of August, 1972.

5.

Your Petitioner shows that the Defendant separated himself from your Petitioner by forcing your Petitioner to live separate and apart from him on or about the 13th day of October, 1972, and the parties have lived separate and apart since that time.

6.

There are no children born as a result of this marriage.

7.

There is presently pending no action for divorce between the parties.

8.

Your Petitioner shows that she brings this proceeding for alimony and separate maintenance as provided for by the provisions of Georgia law, in particular, Section 30-213 of the Georgia Code Annotated, and upon and for legal grounds.

WHEREFORE, your Petitioner prays and demands judgment as follows:

a) That process issue to the Defendant;

b) That your Petitioner have temporary alimony and support from the Defendant including but not limited to reasonable attorneys' fees and all expenses of litigation;

c) That your Petitioner have permanent alimony and support from the Defendant including but not limited to reasonable attorneys' fees and all expenses of litigation;

d) That you Petitioner have such other and further relief as to this Court seems just, right and meet under the circumstances.

PEEK, WHALEY & HALDI

WILLIAM H. WHALEY

GLENVILLE HALDI
Attorneys for Plaintiff

6th Floor, Honeywell Bldg.
6 West Druid Hills Drive, N.E.
Altanta, Ga. 30329
633-4181

M-4

GEORGIA
DEKALB COUNTY

AFFIDAVIT

Personally appeared before the undersigned attesting officer duly authorized to administer oaths, GAIL ADAMS SHEPHERD who after being duly sworn, deposes and says that the facts contained in the within and foregoing Complaint are true and correct.

This 1st day of December, 1972.

GAIL ADAMS SHEPHERD

Sworn to and subscribed before
me this 1st day of December, 1972.

Notary Public
Notary Public, Georgia State at Large
My Commission Expires Sept. 19, 1976

APPENDIX N

THE SUPERIOR COURT FOR THE COUNTY OF DEKALB, STATE OF GEORGIA

Gail Adams Shepherd *Plaintiff*	)	
	)	Civil Action
vs.	)	
	)	File No. 69,633
Charles R. Shepherd *Defendant*	)	

ANSWER

Now comes the defendant in the above-styled matter and files this his Answer, and for same shows:

FIRST DEFENSE

That the complaint fails to state a claim upon which relief can be granted.

SECOND DEFENSE

1.

Defendant admits Paragraph 1 of the complaint.

2.

Defendant admits Paragraph 2 of the complaint.

3.

Defendant admits Paragraph 3 of the complaint.

4.

Defendant denies Paragraph 4 of the complaint as alleged but defendant does admit that the parties hereto entered into a purported marriage on the date alleged.

5.

Defendant admits Paragraph 5 of the complaint.

6.

Defendant denies Paragraph 6 of the complaint as alleged, however, defendant admits there are no children born to the parties hereto.

7.

Defendant admits Paragraph 7 of the complaint.

8.

Defendant denies that plaintiff has any legal grounds upon which to bring this action.

WHEREFORE, defendant prays that he have judgment of Court with all costs cast upon the plaintiff herein.

JOHN C. TYLER
ATTORNEY FOR DEFENDANT

724 Healey Building
Atlanta, Georgia 30303
Phone 523-6254

CERTIFICATE OF SERVICE

I certify that I have served a copy of the within and foregoing Answer upon HONORABLE GLENVILLE HALDI, Attorney of Record for plaintiff, by depositing a copy of same in the United States Mail, addressed to him at 6th Floor, Honeywell Building, 6 West Druid Hills Drive, N. E., Altanta, Georgia, 30329, with sufficient postage attached thereon to reach its destination.

This 18 day of January, 1973.

JOHN C. TYLER

GEORGIA
FULTON COUNTY

Personally appeared before the undersigned officer duly authorized to administer oaths, CHARLES R. SHEPHERD, who, after being duly

sworn on oath, deposes and says that the facts contained in the within and foregoing Answer are true.

CHARLES R. SHEPHERD

Sworn to and subscribed before me,
this 18 day of January, 1973.

JOHN TYLER
Notary Public

APPENDIX O

THE SUPERIOR COURT FOR THE COUNTY OF DEKALB, STATE OF GEORGIA

Gail Adams Shepherd	)	
Plaintiff	)	
	)	Civil Action
vs.	)	
	)	File No. 69,633
Charles R. Shepherd	)	
Defendant	)	

AMENDMENT

Now comes the defendant in the above-styled matter and amends his original Answer heretofore filed as follows:

1.

Defendant amends the First Defense contained in his Answer by adding a subparagraph, which reads as follows:

"(a) Plaintiff's demands that she be granted temporary and permanent alimony and attorneys fees fail to state a claim upon which relief properly can be granted for the reason that said demands are based on Sections 30-202, 30-202.1 (Acts 1967, p. 591), 30-203, 30-204, 30-207, 30-209 (Acts 1870, p. 413), and 39-210, 30-213 of the Georgia Code, which statutes provide that alimony and attorneys fees in alimony and divorce litigation shall be awarded to wives only, which consequently discriminate against husbands as a class of which plaintiff is a member,

and which, as applied to this defendant in this litigation, would discriminate against defendant and deny him equal protection of the laws, and all of which violate Article I, Paragraph III and Article I, Paragraph XXV (Ga. Code Ann. §2-125) of the Constitution of the State of Georgia (Ga. Code §2-103), and also violate the due process and equal protection clauses of the Fourteenth Amendment of the United States Constitution."

2.

Defendant further amends his said Answer heretofore filed by amending his Second Defense as follows:

9.

That the Court has entered a temporary alimony order in this matter on the 7th day of March, 1973, providing that the defendant pay certain sums of money to the plaintiff as alimony.

That the defendant herein has raised the issue of the constitutionality of the alimony statutes of the State of Georgia as hereinabove set out in this Amendment, same constituting Subparagraph (a) of defendant's First Defense.

That unless the plaintiff is restrained and enjoined from enforcing the provisions of the temporary alimony order heretofore entered on the 7th day of March, 1973, until the said constitutional issue raised by the defendant herein can be dissolved,

this defendant will suffer irreparable harm, and that this defendant has no adequate remedy at law."

WHEREFORE, defendant demands that the plaintiff herein be restrained and enjoined from enforcing the temporary order of Court, entered on the 7th day of March, 1973, by this Court, until the constitutional issues raised by defendant as to the constitutionality of the alimony statutes of the State of Georgia, as set out in this Amendment, can be resolved.

Respectfully submitted,

JOHN C. TYLER
ATTORNEY FOR DEFENDANT

1747 The Equitable Building
100 Peachtree Street, N. W.
Atlanta, Georgia 30303
Phone 523-6254

GEORGIA
FULTON COUNTY

Personally appeared before the undersigned officer duly authorized to administer oaths, CHARLES R. SHEPHERD, who, after being duly sworn on oath, deposes and says that the facts contained in the within and foregoing Amendment are true.

CHARLES R. SHEPHERD

Sworn to and subscribed before me,
this 30th day of October, 1973.

JOHN TYLER
Notary Public

APPENDIX P

THE SUPERIOR COURT FOR THE COUNTY OF DEKALB, STATE OF GEORGIA

Gail Adams Shepherd Plaintiff	)	
	)	Civil Action
vs.	)	
	)	File No. 69,633
Charles R. Shepherd Defendant	)	

AMENDMENT

Now comes the defendant in the above-styled matter and amends his original Answer heretofore filed as follows:

1.

Defendant amends the prayer contained in his Answer by adding a subparagraph, which reads as follows:

"(a) That the alimony statutes of the State of Georgia as enumerated herein be declared unconstitutional."

JOHN C. TYLER
ATTORNEY FOR DEFENDANT

1747 The Equitable Building
100 Peachtree Street, N.W.
Atlanta, Georgia 30303
Phone 523-6254

GEORGIA
FULTON COUNTY

Personally appeared before the undersigned officer duly authorized to administer oaths, CHARLES R. SHEPHERD, who, after being duly sworn on oath, deposes and says that the facts contained in the within and foregoing Amendment are true.

CHARLES R. SHEPHERD

Sworn to and subscribed before me,
this 1st day of November, 1973.

JOHN C. TYLER
Notary Public

CERTIFICATE OF SERVICE

I certify that I have served a copy of the within and foregoing Amendment upon HONORABLE GLENVILLE HALDI and HONORABLE WILLIAM H. WHALEY, Attorneys of Record for the plaintiff, by depositing a copy of same to each of them in the United States Mail addressed to them at 6th Floor, Honeywell Building, 6 West Druid

Hills Drive, N.E., Atlanta, Georgia 30329, with sufficient postage on each to reach its destination.

This 1st day of November, 1973.

JOHN C. TYLER

APPENDIX Q

THE SUPERIOR COURT FOR THE COUNTY OF DEKALB, STATE OF GEORGIA

Gail Adams Shepherd Plaintiff	)	
	)	Civil Action
vs.	)	
	)	File No. 69,633
Charles R. Shepherd Defendant	)	

DEFENDANT'S THIRD AMENDMENT

Now comes the defendant in the above-styled matter and amends his original Answer as amended as follows:

1.

Defendant amends the First Defense contained in his Answer as amended by striking Subparagraph (a) as set out in defendant's First Amendment, heretofore filed on October 31, 1973, and substituting in lieu thereof the following:

"Plaintiff's demands that she be granted temporary and permanent alimony and attorneys fees fail to state a claim upon which relief properly can be granted for the reason that the said demands are based upon the Alimony Statutes of the State of Georgia, specifically as set out in Title 30, Sections 201 (Code of Georgia of 1933); 202 (Code of Georgia of 1933); 202.1 (Ga. Laws 1967, p. 591); 203 (Code of Georgia of 1933); 204 (Code of Georgia of 1933); 207

(Code of Georgia of 1933; Ga. Laws 1870, p. 413); 208 (Code of Georgia of 1933; Ga. Laws 1870, p. 413); 209 (Act 1806, Cobb, 224, 225. Ga. Laws 1866, pp. 146, 147; 1966, p. 160); 212 (Code of Georgia of 1933); and 213 (Code of Georgia of 1933; Ga. Laws 1870, p. 413), of the Georgia Code Annotated as Amended, because the said Statutes provide that alimony and attorneys fees in alimony and divorce litigation shall be awarded to wives only, which consequently discriminate against husbands as a class of which defendant is a member, and which, as applied to the defendant in this litigation, would discriminate against defendant and deny him equal protection of the laws, and all of which violate Article I, Paragraph III, and Article I, Paragraph XXV, of the Constitution of the State of Georgia; the due process clause of the Fifth Amendment of the United States Constitution; and the due process and equal protection clauses of the Fourteenth Amendment of the United States Constitution as contained in Section 1 thereof."

2.

Defendant further amends his said Answer as amended by striking Paragraph 9 of his Second Defense in its entirety and substituting in lieu thereof the following:

"9.

That this Court has entered a temporary alimony order in this case on the 7th day of March, 1973, providing that this defendant pay certain sums to the plaintiff herein as alimony and attorney fees.

(a) That this defendant has raised the issue of the constitutionality of the alimony statutes of the State of Georgia as set out in his Answer as herein amended and contained in Subparagraph (a) of defendant's First Defense.

(b) That unless plaintiff is restrained and enjoined from enforcing the provisions of the temporary alimony order heretofore entered on the 7th day of March, 1973, until the said constitutional issues raised by the defendant herein can be finally adjudicated, this defendant will suffer irreparable harm, injury and damage to his person and property, and further, that this defendant has no adequate remedy at law."

3.

Defendant further amends his said Answer as amended by striking the prayers and demands contained in the original Answer, the First Amendment filed on the 31st day of October, 1973, and the Second Amendment filed on the 2nd day of November, 1973, all in their entirety, and substituting in lieu thereof the following:

"Wherefore, defendant prays:

(a) That each and every prayer and demand of the plaintiff be denied;

(b) That the Alimony Statutes of the State of Georgia, specifically as set out in Title 30, Sections 201 (Code of Georgia of 1933); 202 (Code of Georgia of 1933); 202.1 (Ga. Laws 1967, p. 591); 203 (Code of

Georgia of 1933); 204 (Code of Georgia of 1933); 207 (Code of Georgia of 1933; Ga. Laws 1870, p. 413); 208 (Code of Georgia of 1933; Ga. Laws 1870, p. 413); 209 (Act 1806, Cobb, 224, 225. Ga. Laws 1866, pp. 146, 147; 1966, p. 160); 212 (Code of Georgia of 1933); and 213 (Code of Georgia of 1933; Ga. Laws 1870, p. 413), of the Georgia Code Annotated as Amended be declared unconstitutional.

(c) That the plaintiff herein be restrained and enjoined from enforcing the provisions of the temporary Order of Court entered on the 7th day of March, 1973, by this Court, relative to the payment of alimony and attorney fees until the constitutional issues raised by the defendant as to the constitutionality of the alimony statutes of the State of Georgia, as set out in this Amendment, can be finally adjudicated."

Respectfully submitted,

JOHN C. TYLER
ATTORNEY FOR DEFENDANT

1747 The Equitable Building
100 Peachtree Street, N.W.
Atlanta, Georgia 30303
Phone 523-6254

GEORGIA
FULTON COUNTY

Personally appeared before the undersigned officer duly authorized to administer oaths, CHARLES R. SHEPHERD, who, after being duly sworn on oath, deposes and says that the facts contained in the within and foregoing Amendment are true.

CHARLES R. SHEPHERD

Sworn to and subscribed before me,
this 7th day of January, 1974.

JOHN C. TYLER
Notary Public

CERTIFICATE OF SERVICE

I certify that I have served a copy of the within and foregoing Amendment upon HONORABLE GLENVILLE HALDI and HONORABLE WILLIAM H. WHALEY, Attorneys of Record for the plaintiff, by depositing a copy of same to each of them in the United States Mail, addressed to Mr. Haldi at 1820 Fulton National Bank Building, Atlanta, Georgia, and to Mr. Whaley at 6th Floor, Honeywell Building, 6 West Druid Hills Drive, N.E., Atlanta, Georgia, with sufficient postage on each to reach its destination.

This 7th day of January, 1974.

JOHN C. TYLER

APPENDIX R

Gail Adams Shepherd	)	No. 69,633
	)	
Plaintiff	)	DeKalb Superior Court
	)	
vs.	)	
Charles R. Shepherd	)	
	)	
Defendant	)	

VERDICT OF JURY

We the jury award permanent alimony to the plaintiff against the defendant as follows:

1. A lump sum of $15,000., to be paid by March 1, 1974.

2. $500 per month beginning March 1, 1974.

Monthly payments shall be paid on the 1st of each month thereafter until such time as the plaintiff remarries or is deceased.

This 22nd day of Feb., 1974.

CHARLES P. EPPERSON
FOREMAN

APPENDIX S

IN THE SUPERIOR COURT FOR THE
COUNTY OF DeKALB
STATE OF GEORGIA

Gail Adams Shepherd,	)	
	)	
Plaintiff	)	Civil Action
	)	
vs.	)	File Number 69,633
	)	
Charles R. Shepherd,	)	
	)	
Defendant	)	

JUDGMENT

The within and foregoing case having regularly appeared on the civil jury trial calendar and after hearing motions of the Plaintiff Wife's Counsel for continuance, and after having overruled the said motions for continuance, and after presentation of evidence and argument of counsel, and the jury having returned a verdict in favor of the Plaintiff Wife against the Defendant, the Court enters the following Judgment:

1.

The Plaintiff Wife shall have and recover against the Defendant the sum of $15,000.00 payable on or before March 1, 1974.

2.

Beginning March 1, 1974, and continuing on the first day of each month thereafter until the wife dies, remarries, or until such time as this Judgment is superseded by any other Order of any Court of competent jurisdiction of the parties and of the subject matter, the Defendant shall pay to Plaintiff Wife the sum of $500.00 per month.

3.

A state of separation is hereby declared and decreed by this Court to exist between the parties.

4.

The provisions of this Judgment providing for payments to Plaintiff Wife by Defendant shall be deemed permanent alimony.

5.

Nothing in this Judgment is to be construed as precluding the Plaintiff Wife from bringing any other motion or seeking any other remedy she may have in regard to any claim she may have or make as to unpaid amounts under previous temporary Orders of this Court. This Court specifically states that it made no finding as to any such alleged claim of the Plaintiff Wife and directed the attorneys for the Plaintiff Wife to pursue any such remedy or make any such claim before the motions division of this Court. The Court is aware of the pending Motion of both parties of this law suit concerning matters con-

tained in the temporary Orders previously passed by this Court. The Court made an express determination and ruling that there was no just reason for delay in the trying of this law suit and directed Counsel for both parties to proceed with the jury trial. The Court directed the attorneys for the Plaintiff Wife to prepare and submit this Judgment and made an express determination for the entry of this Judgment.

Both parties are ordered and directed to comply with all the terms and provisions of this Judgment.

IT IS SO ORDERED, this 4th day of March, 1974.

H. O. HUBERT, JR., JUDGE
Superior Court of DeKalb
County, Stone Mountain
Judicial Circuit

This Judgment was
presented by:
Glenville Haldi
KALER, KARESH & FRANKEL
1820 Fulton National Bank Building
Atlanta, Georgia 30303
525-8401

APPENDIX T

IN THE SUPERIOR COURT FOR THE
COUNTY OF DEKALB
STATE OF GEORGIA

Charles R. Shepherd	)	
	)	
Plaintiff	)	Civil Action
	)	
vs.	)	File No. 69,633
	)	
Gail Adams Shepherd	)	
	)	
Defendant	)	

MOTION TO SET ASIDE JUDGMENT

Comes now the Plaintiff, pursuant to Georgia Code Annotated 81A-160(d) and moves this Court for an Order setting aside the judgment rendered in the separate maintenance suit; said judgment dated on or about March 4, 1974.

1.

Plaintiff shows that the judgment was predicated upon Georgia Code Annotated 30-201 which has been declared unconstitutional and creates a non-amendable defect appearing on the record.

2.

Plaintiff shows that he, by amendment, raised and attacked the Georgia Alimony Statutes prior to the time of trial.

WHEREFORE, plaintiff prays:

(a) That his motion to set aside this judgment be granted;

(b) That defendant be served as provided by law;

(c) That all arrest Orders, FiFas, and garnishments be stayed until such time as this motion may be heard;

(d) For such other and further relief.

B. J. SMITH
Attorney for Plaintiff

T-3

IN THE SUPERIOR COURT FOR THE
COUNTY OF DEKALB
STATE OF GEORGIA

Charles R. Shepherd	)	
	)	
Plaintiff	)	Civil Action
	)	
vs	)	File No. 69,633
	)	
Gail Adams Shepherd	)	
	)	
Defendant	)	

BRIEF IN SUPPORT OF MOTION TO SET ASIDE JUDGMENT STATEMENT OF FACTS

In 1973, Mrs. Gail Adams Shepherd filed a Complaint for Permanent Alimony in the Superior Court of DeKalb County, Georgia, asking for temporary alimony, attorney fees, expenses of litigation and permanent alimony. Defendant (plaintiff here), Charles R. Shepherd, answered the complaint and soon thereafter amended his Answer, using a Constitutional attack on the Georgia alimony statutes as his first defense.

The Constitutional issue was considered as a preliminary matter by the Court on February 20, 1974, and was overruled as a defense. The case then went to a jury tral with a verdict for plaintiff resulting on February 22, 1974. Thereafter, the Court entered a judgment pursuant to the verdict.

Defendant (plaintiff here) Charles R. Shepherd appealed this verdict and judgment in a timely manner to the Supreme Court of Georgia, enumerating the Constitutional questions as one error. The State Supreme Court, however, unanimously upheld the alimony statutes' constitutionality and affirmed the trial court ruling.

Defendant (plaintiff here) then petitioned the United States Supreme Court for a writ of certiorari, which was denied on April 21, 1975.

A final decree of divorce was awarded in the Shepherd case on February 20, 1974, and there have been numerous appeals as to the effect and proper interpretation of the divorce award and the separate alimony awards.

BRIEF OF LAW

In *Orr v. Orr*, (77-1119, decided March 5, 1979), the Court overturned the Alabama statutory scheme which provided for alimony only in favor of the wife. In that case, the husband was in arrears on his permanent alimony payments and at a consequent contempt proceeding brought by the wife, he defended by raising the Constitutional question regarding the alimony statute. It was his contention that he should not be required to pay alimony if similarly situated wives would not be required to do so. The Court basically agreed with him, ruling that the stated purposes of the Alabama alimony statutes could be effectuated better by the use of a gender neutral law which would place alimony obligations on the spouse able to pay, regardless of gender.

In *Stitt v. Stitt*, 243 Ga. 301 (253 SE2d 764) (1979), a suit for divorce and alimony, appellant husband challenged an award obligating him to pay temporary alimony by challenging the provisions of the Georgia Code which supported such awards. The Supreme Court of Georgia ruled that Code provisions Sections 30-201, 30-202, 30-202.1, and 30-203 do violate the Equal Protection Clause of the Fourteenth Amendment and are unconstitutional under *Orr v. Orr*, supra.

In *Ford v. Ford*, (Case No. 34571, decided May 30, 1979), Appellant argued that the trial court erred in not declaring the Georgia alimony and child support statutes, Code §§30-201, 30-206, 30-207, 30-220, 30-301; 74-105, unconstitutional on the ground that these statutes violated the due process and equal protection requirements of the Georgia and United States Constitutions. Appellant timely and properly raised these constitutional issues in the trial court. (Compare *Kosikowski v. Kosikowski*, Case No. 34608, decided April 3, 1979). Our Supreme Court ruled that the statutes under which alimony and child support were awarded are unconstitutional in light of the *Orr* decision and granted the Appellant a new trial as to those issues.

Defendant (plaintiff here) Shepherd's obligations to pay temporary alimony, under the terms of various orders during the course of this domestic litigation, are all based upon unconstitutional, and hence invalid, statutes according to *Stitt v. Stitt*, and *Ford v. Ford*, supra, decisions handed down by our Supreme Court of Georgia and *Orr v. Orr*, decided by the Supreme Court of the United States.

CONCLUSION

Defendant (plaintiff here) Shepherd not only raised the constitutional issue timely, he pursued it as far as was judicially possible at that time. He appealed to the Georgia Supreme Court the trial court's overruling of this constitutional contention and, when that appeal failed, he appealed to the United States Supreme Court but was denied a writ of certiorari.

Defendant's 1974 Constitutional contentions were neither invalid nor frivolous nor inappropriate. They have been amply validated by recent decisions of the highest courts in the land and in this state and defendant is now entitled to a judicial vindication of his earlier defense.

To allow this judgment to stand would be sanctioning a direct violation of the findings of the United States Supreme Court.

Respectfully submitted,

B. J. Smith, Attorney for
Plaintiff, Charles R. Shepherd

APPENDIX U

IN THE SUPREME COURT OF GEORGIA

Charles R. Shepherd,	)	
	)	
Appellant,	)	
	)	Civil Action
vs.	)	File No. 37080
Gail Adams Shepherd,	)	
	)	
Appellee.	)	

ENUMERATION OF ERROR

The trial court erred in refusing to grant Appellant's motion to set aside the judgment of separate permanent maintenance which was entered on March 4, 1974.

Respectfully submitted,

ROBERT L. PENNINGTON

KEVIN C. GREENE
Attorneys for Appellant

CERTIFICATE OF SERVICE

This is to certify that the undersigned has served this day a copy of the foregoing ENUMERATION OF ERROR by depositing a copy thereof in First

Class United States mail, postage prepaid to Appellee's Attorney of record at the following address:

Glenville Haldi, Esq.
P.O. Box 13955
Atlanta, Georgia 30324

this 31st day of December, 1980.

KEVIN C. GREENE
Attorney for Appellant

TROUTMAN, SANDERS, LOCKERMAN
& ASHMORE
1400 Candler Building
Atlanta, Georgia 30043
(404) 658-8000

APPENDIX V

United States Constitution
Amendment XIV, Sec. 1

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX W

Georgia Code § 2-3104

The Supreme Court shall have no original jurisdiction but shall be a court alone for the trial and correction of errors of law from the superior courts and the city courts of Atlanta and Savannah, as existed on August 16, 1916, and such other like courts as have been or may hereafter be established in other cities, in all cases that involve the construction of the Constitution of the State of Georgia or of the United States, or of treaties between the United States and foreign governments; in all cases in which the constitutionality of any law of the State of Georgia or of the United States is drawn in question; and, until otherwise provided by law, in all cases respecting title to land; in all equity cases; in all cases which involve the validity of, or the construction of wills; in all cases of conviction of a capital felony; in all habeas corpus cases; in all cases involving extraordinary remedies; in all divorce and alimony cases, and in all cases certified to it by the Court of Appeals for its determination. It shall also be competent for the Supreme Court to require by certiorari or otherwise any case to be certified to the Supreme Court from the Court of Appeals for review and determination with the same power and authority as if the case had been carried by writ of error to the Supreme Court. Any case carried to the Supreme Court or to the Court of Appeals, which belongs to the class of which the other court has jurisdiction, shall, until otherwise provided by law, be transferred to the other court under such rules as the Supreme Court may prescribe, and the cases so

transferred shall be heard and determined by the court which has jurisdiction thereof. The General Assembly may provide for carrying cases or certain classes of cases to the Supreme Court and the Court of Appeals from the trial courts otherwise than by writ of error, and may prescribe conditions as to the right of a party litigant to have his case reviewed by the Supreme Court or Court of Appeals. The Supreme Court shall also have jurisdiction of and shall decide cases transferred to it by the Court of Appeals because of an equal division between the judges of that Court when sitting as a body for the determination of cases.

APPENDIX X

Georgia Code § 6-701.1

(a) Appeals in the following types of cases shall be as provided in this section:

. . .

(2) Appeals from judgments or orders granting or refusing a divorce or temporary or permanent alimony, awarding or refusing to change child custody, or holding or declining to hold persons in contempt of such alimony or child custody judgment or orders.

(b) All appeals taken in cases specified in subsection (a) above shall be by application in the nature of a petition enumerating the errors to be urged on appeal and stating why the appellate court has jurisdiction. The application shall specify the order or judgment being appealed, and if such order or judgment is interlocutory the application shall set forth, in addition to the enumeration of errors to be urged, the need for interlocutory appellate review.

(c) The applicant shall include as exhibits to the petition a copy of the order or judgment being appealed, and should include a copy of the petition or motion which led directly to the order or judgment being appealed and a copy of any responses to such petition or motion. An applicant may include copies of such other parts of the record or transcript as he deems appropriate. No certification of such copies by the clerk of the trial court shall be necessary in conjunction with the application.

(d) Such application shall be filed with the clerk of the Supreme Court or Court of Appeals within 30 days of the entry or order, decision or judgment complained of and a copy of such application, together with a list of those parts of the record included with the application, shall be served upon the opposing party or parties as provided by law, except that such service shall be perfected at or before the filing of the application, but when a motion for new trial, or a motion in arrest of judgment, or a motion for judgment notwithstanding the verdict has been filed, the application shall be filed within 30 days after the entry of the order granting, overruling, or otherwise finally disposing of the motion.

APPENDIX Y

Georgia Code § 30-201 et seq. (1973)

§201. *Definition. Permanent and temporary.* Alimony is an allowance out of the husband's estate, made for the support of the wife when living separate from him. It is either temporary or permanent. (Code of 1933)

§202. *Proceedings to obtain temporary alimony.* Whenever an action for divorce, at the instance of either party, or a suit by the wife for permanent alimony, shall be pending, the wife may, at any regular term of the court in which the same shall be pending, apply to the presiding judge, by petition, for an order granting to her temporary alimony pending the cause; and, after hearing both parties and evidence as to all the circumstances of the parties and as to the fact of marriage, the court shall grant an order allowing such temporary alimony, including expenses of litigation, as the condition of the husband and the facts of the case may justify. (Code of 1933)

§202.1. *The grant of attorneys' fees to be a final judgment.* The grant of attorneys' fees as a part of the expenses of litigation made at any time during the pendency of the litigation, whether the action be for alimony, divorce and alimony, or contempt of court arising out of either an alimony case or a divorce and alimony case, shall be a final judgment as to the amount granted, whether the grant be in full or on account, and may be enforced by attachment for contempt of court or by writ of fieri facias,

whether the parties subsequently reconcile or not: Provided, that nothing contained herein shall be construed to mean that attorneys' fees shall not be awarded at both the temporary hearing and the final hearing. (Ga. L. 1967, p. 591)

§203. *Discretion of the judge as to temporary alimony.* In arriving at the proper provision, the judge shall consider the peculiar necessities of the wife growing out of the pending litigation; also any evidence of a separate estate owned by the wife; and if such estate is ample, as compared with the husband's, temporary alimony may be refused. (Code of 1933)

§204. *Revision and enforcement of order allowing alimony.* The order allowing alimony shall be subject to revision by the court at any time, and may be enforced either by writ of fieri facias or by attachment for contempt against the person of the husband. A failure to comply with the order shall not deprive the husband of his right either to prosecute or defend his cause. (Code of 1933)

§206. *Support and custody of children pending suits for divorce; liability of husband for necessaries.* In suits for divorce, the judge presiding may, either in term or vacation, grant alimony, or decree a sum sufficient for the support of the family of the husband dependent upon him, and who have a legal claim upon his support, as well as for the support of his wife; and may also hear and determine who shall be entitled to the care and custody of the children pending the litigation, as if the same were before him on a writ of habeas corpus; and in case a sum

shall be awarded for the support of said family, the husband shall not be liable to third persons for necessaries furnished them. (Code of 1933, Acts 1870, p. 413)

§209. *Jury may provide permanent alimony; factors in determining amount; effect of remarriage by wife.* The jury rendering the final verdict in a divorce suit may provide permanent alimony for the wife, either from the corpus of the estate or otherwise, according to the condition of the husband. In all cases where alimony is awarded to the wife, her separate estate and earning capacity, as well as any fixed liabilities of the husband for the support of minor children, shall be taken into consideration in fixing the amount. All obligations for permanent alimony to the wife, whether created by contract, verdict, judgment, or decree, the time for performance of which has not yet arrived, shall cease upon her remarriage unless otherwise provided in the decree. (Acts 1806, Cobb, 224; 225; Acts 1866, pp. 146, 147; Acts 1966, p. 160)

§212. *Decree in equity.* In the absence of such provision, on the application of the wife, equity may, by decree, compel the husband to make such provision for the support of the wife and such minor children as may be in her custody as indicated in the foregoing section. (Code of 1933)

APPENDIX Z

Georgia Code § 81A-115

(a) Amendments

A party may amend his pleading as a matter of course and without leave of court at any time before the entry of a pre-trial order. Thereafter the party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party may plead or move in response to an amended pleading and, when required by an order of the court, shall plead within 15 days after service of the amended pleading, unless the court otherwise orders.

. . .

(c) Relation back of amendments

Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back to the date of the original pleadings if the foregoing provisions are satisfied, and, within the period provided by law for commencing the action against him, the party to be brought in by amendment (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for

a mistake concerning the identity of the proper party, the action would have been brought against him.

APPENDIX AA

Georgia Code § 81A-160

(a) Collateral attack

A judgment void on its face may be attacked in any court by any person. In all other instances, judgments shall be subject to attack only by a direct proceeding brought for that purpose in one of the methods hereinafter prescribed.

. . .

(d) Motion to set aside

A motion to set aside must be predicated upon some nonamendable defect which does appear upon the face of the record of pleadings, or a motion to set aside shall also lie to attack a judgment based upon lack of jurisdiction over the person or subject matter, regardless of whether such lack of jurisdiction appears upon the face of the record of pleadings. To be subject to motion to set aside, it is not sufficient that the complaint or other pleadings fail to state a claim upon which relief can be granted, but the pleadings must affirmatively show that no claim in fact existed.

. . .

(f) Procedure; time of relief

Reasonable notice shall be afforded the parties on all motions. Relief in equity must proceed by complaint and summons. A judgment void because of

lack of jurisdiction of the person or subject-matter may be attacked at any time. Motions for new trial must be brought within the time now or hereafter prescribed by law. In all other instances, all motions, complaints or other proceedings to set aside or attack judgments shall be brought within three years from entry of the judgment complained of.

(h) Law of the case rule

The law of the case rule is hereby abolished, but generally judgments and orders shall not be set aside or modified without just cause, and in setting aside or otherwise modifying judgments and orders, the court shall consider whether rights have vested thereunder, and whether or not innocent parties would be injured thereby: Provided, however, that any ruling by the Supreme Court or the Court of Appeals in a case shall be binding in all subsequent proceedings in that case in the lower court and in the Supreme Court or the Court of Appeals as the case may be.

(Acts 1966, pp. 609, 662; 1967, pp. 226, 239, 240; 1974, p. 1138).

CERTIFICATE OF SERVICE

I hereby certify that I have this day served three copies of the foregoing PETITION FOR WRIT OF CERTIORARI upon Respondent by depositing a copy of the same in the United States Post Office, first-class, postage prepaid, to:

The Honorable Glenville Haldi
1570 Tower Place
3340 Peachtree Road, N.E.
Atlanta, Georgia 30026

This ___ day of _____, 1981.

ROBERT L. PENNINGTON
Counsel of Record for
Petitioner

NO. 80-2083

Office - Supreme Court, U.S.
FILED
SEP 25 1981
ALEXANDER L. STEVAS,
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1981

CHARLES R. SHEPHERD,
Petitioner

v.

GAIL ADAMS SHEPHERD,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

Submitted By:

Glenville Haldi
1570 Tower Place
3340 Peachtree Road, N.E.
Atlanta, Georgia 30026

Ph-404-261-4401

William H. Whaley
Peek & Whaley
6th Floor, Honeywell Building
6 West Druid Hills Drive, N.E.
Atlanta, Georgia 30329

Ph-404-633-4181

Attorneys for Respondent

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

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RESPONSE TO PETITION FOR WRIT OF CERTIORARI

Before discussing the legal merits of this Application for Certiorari, the Respondent needs to add to the factual statements:

(1) The Application for Certiorari would lead the reader to the conclusion that the Husband is faced with continuing burden to pay alimony. This is not correct. The last installment of alimony was in August of 1976 when the Wife remarried. Her remarriage completely and permanently terminated any further right to any payment of alimony.

(2) The total amount levied against the Husband was for: (a) temporary support; (b) attorneys fees; (c) permanent alimony; (d) court costs; and, (e) interest. Part of these amounts were levied against him when he was found in contempt of court.

(3) The permanent alimony has all been paid by the Husband.

(4) The "wives only" alimony statutes referred to by Petitioner were repealed by the Georgia Legislature in 1979 (*Ga. Code Ann.*, § 30), and replaced by a completely constitutional law allowing alimony

to either party. The new laws are not challenged in any respect.

Furthermore, the Georgia Supreme Court has always completely accepted the holding of this Court in *Orr v. Orr*, 440 U.S. 268, [*Stitt v. Stitt*, 243 Ga. 301 (March 8, 1979)], and the Georgia Courts uniformally apply *Orr v. Orr* (supra.).

(5) At no place in the Application for Certiorari has the Petitioner made any attempt to show that this is a proper matter for Certiorari. There is nothing hereby but a private controversy with no implications or effect beyond this case.

(6) The ruling of the Georgia Supreme Court from which this Application is taken does not mention alimony or any other issue which the Petitioner attempts to raise. That decision deals with the failure of the Petitioner to properly follow the rules of appellate procedure in Georgia. The pertinent portion of that decision says:

> "It appearing that no application for discretionary appeal has been filed, this case must be and is hereby dismissed."

(7) The earlier decisions of the Georgia Supreme Court which deal with alimony such as *Shepherd v. Shepherd*, 243 Ga. 253 (1979), and *Shepherd v. Shepherd*, 244 Ga. 545 (1979) were more than 90 days before the Application for Certiorari was filed and hence, this Application is not timely filed. Actually, these decisions are more than two years old.

(8) The Petitioner did not file a timely constitutional objection in the trial court. A brief chronology is needed at this point.

(a) December 1, 1972, the Wife filed her Complaint.

(b) January 18, 1972, the Husband filed his Answer omitting any claim that the alimony statutes were unconstitutional.

(c) March 7, 1973, the trial court held a hearing on temporary alimony. After a showing of need on the part of the Wife and a showing of the Husband's ability to pay, the trial court entered an order granting the Wife an award of temporary alimony. The Husband appealed this temporary order.

(d) October 5, 1973, the Supreme Court of Georgia affirmed the trial court's temporary order.

(e) October 31, 1973, the Husband filed for the first time his claim that the proceeding was unconstitutional. Thus, the constitutional objection by the Husband was made only after he had obtained a ruling of both the trial court and the Supreme Court of Georgia. He never made any constitutional objection until he became dissatisfied with the rulings.

(9) The Husband earlier made an application for certiorari to this Court based on these same arguments. Certiorari was denied. (*Shepherd v. Shepherd*, 421 U.S. 932).

ARGUMENT AND CITATIONS

I.

This is the holding from which the Petitioner appeals:

> "It appearing that no application for discretionary appeal has been filed, this case must be and is hereby dismissed."

The decision of the Supreme Court of Georgia rendered in March of 1981 deals only with the question of whether or not the Petitioner properly followed established rules and procedures in an appeal. He did not.

There is nothing in that decision dealing with alimony. Those issues have all been raised and decided in the many appeals which have gone before. What the Petitioner seeks is to use the decision of March, 1981 as a vehicle to open up the prior appellate decisions. Obviously the Petitioner has not timely sought any review of those previous decisions (28 U.S.C. 2101), and there does not seem to be any authority allowing a petitioner in a civil case to go back and gain review by certiorari of final judgments rendered many years ago simply by making a motion.

If the Petitioner is correct, any judgment is open to attack even if the time has run. The procedure is simple. Make any motion, appeal it to the state appellate court, then apply for certiorari and complain about the prior decision.

There is nothing in the present decision of March, 1981 which the Petitioner attacks. Every bit of his argument is directed to decisions made years ago. Even his motion to set aside the judgment has been the subject of three previous appeals: *Shepherd*

v. Shepard, 241 Ga. 485 (June, 1978), Shepherd v. *Shepard*, 243 Ga. 253 (March, 1979), and *Shepherd v. Shepherd*, 244 Ga. 545 (October, 1979). It is those decisions which are brought into question by this Application for Certiorari, and it would seem that such an application is simply not timely.

II.

There was no written motion which was the subject of this appeal. When the trial court held its hearing, there was only some sort of vague oral motion. This does not appear at first glance because the Petitioner did not have the transcript of evidence prepared.[1] Had the Georgia Supreme Court gotten to the merits of the appeal, it likely would have found any such oral motion defective.

The written motion which is included in Petitioner's Applications as Appendix T was filed on March 15, 1979, and was the subject of *Shepherd v. Shepherd*, 243 Ga. 253 (March, 1979), and *Shepherd v. Shepherd*, 244 Ga. 545 (October, 1979).

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1. The Attorneys representing the Petitioner in this Application did not represent him and took no part in any of the trial proceedings. No slight is intended to them by any of this brief. They took the case as they found it and had no chance to perfect it.

III.

Georgia has codified its rules of practice and procedure and modeled them on the Federal Rules of Practice and Procedure. One of these rules is that a motion such as this to set aside a judgment must be brought within three years from the date of the entry of judgment [Ga. Code Ann., §81A-160(A)]. This rule is basically the same as Federal Rule 60 except the Federal Rules provide only a one year period in which to attack the judgment.

No motion was ever made by the Petitioner within the proscribed time period.

The Petitioner seems to acknowledge this when he says the judgment is void on its face, but this is incorrect. A judgment void on its face means usually a jurisdictional defect. Even if a consitituional defect appeared, this is something which would have to be developed and shown from the record because Georgia, like every other jurisdiction, allows the waiver of constitutional provisions (*Pacelet Manufacturing Co. v. Crescent Textiles, Inc.*, 219 Ga. 268).

For example: a criminal conviction entered by the Court without a jury trial is not ipso facto a denial of the constitutional right of a jury trial. Such a right may be waived.

That is what happened in this case.

The Petitioner first answers (January, 1973) and participated in a temporary alimony proceeding (March, 1973). When the Petitioner was dissatisfied with the results of the temporary hearing, he filed an appeal (March, 1973) and obtained a decision from the Supreme Court of Georgia [*Shepherd v. Shepherd*, 231 Ga. 254 (October 5, 1973)]. Only after the appellate decision was unsatisfactory to him did he file an amendment (October 31, 1973) attacking the constitutionality of the proceedings.

The Petitioner's brief implies that a litigant is entitled to file constitutional challenges at any time before the trial. This is incorrect. Georgia Law requires a constitutional challenge to be filed at the first opportunity (*Hazelhurst v. Southern First Distributors, Inc.*, 46 Ga. App. 453).

Georgia, like all other jurisdictions, will not allow a litigant to first try his cause and then appeal it and only then decide whether he is satisfied with the results as a measure of the timeliness of challenging the proceedings. Needless to say, had the result been satisfactory, he would have accepted the decision. This strategy amounts to a failure to properly present a constitutional challenge.

IV.

As mentioned previously, the award of alimony terminated in 1976 and it has been paid. The matters dealing with attorneys fees, costs, interest, etc., are based on the court's common law equitable powers (*Stitt v. Stitt*, 243 Ga. 301, *Stitt v. Stitt*, 243 Ga. 730 and *Ford v. Ford*, 245 Ga. 569).

But it should be pointed out that there is no present statute or decision of the State of Georgia anywhere challenged by the Petitioner. *Orr v. Orr* has been completely and unequivocally accepted by the courts and legislature of the State of Georgia. What the Petitioner complains of is the law in effect in 1973 which was totally and fully and completely repealed in 1979. (*Stitt*, op. cit.; *Ford*, op. cit.)

CONCLUSION

This Application never attempted to set out anything more than a private controversy which should have ended many years ago. If the Petitioner had any matter to bring to this Court it should alsohave been presented in a proper and timely fashion when the decisions were rendered. Instead, the Petitioner failed to appeal any of those decisions and now asks this Court to go back many years and

many decisions by granting a Certiorari application from a ruling that he has failed to properly follow required appellate procedures.

Presumably, if Petitioner is correct, this Court will instruct the Supreme Court of Georgia to consider the points he makes in his application when the Georgia Supreme Court has ruled that he did not properly bring anything to that Court for decision.

Actually, the position of the Applicant is quite simple: every alimony judgment rendered prior to *Orr v. Orr* is void, and any husband can bring any sort of motion to set aside any alimony decree regardless of whether he follows proper appellate rules, regardless of any time limitations, and regardless of whether he properly and timely raised the issue before.

Respectfully submitted,

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Glenville Haldi

1570 Tower Place
3340 Peachtree Road, N.E.
Atlanta, Georgia 30026

Ph-404-261-4401

William H. Whaley

Peek & Whaley
6th Floor, Honeywell Building
6 West Druid Hills Drive, N.E.
Atlanta, Georgia 30329

Attorneys for Respondent

Ph-404-633-4181

CERTIFICATE OF SERVICE

This is to certify that I have this day served:

Robert L. Pennington
Kevin C. Greene
1400 Candler Building
Atlanta, Georgia 30043

with a copy of the within and foregoing RESPONSE TO PETITION FOR WRIT OF CERTIORARI, by depositing a copy of same in the United States Mail, in a properly addressed envelope, with adequate postage thereon.

This 24 day of September, 1981.

Glenville Haldi
Attorney for Respondent